SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1943

No. 276

THE SECURITY FLOUR MILLS COMPANY, PETITIONER,

vs.

COMMISSIONER OF INTERNAL REVENUE

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE TENTH CIRCUIT

INDEX.

JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., NOVEMBER 9, 1943.

—8853

[fol. 1]

IN THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE TENTH CIRCUIT

No. 2556

Commissioner of Internal Revenue, Petitioner,

vs.

The Security Flour Mills Company, Respondent

No. 2589

The Security Flour Mills Company, Petitioner,

vs.

Commissioner of Internal Revenue, Respondent

Designation of Portion of the Record to Be Printed, No. 2556—Filed May 2, 1942

Comes Now the petitioner on review herein, and complying with the rules of this Court, pertaining to the designation of the portion of the record to be printed, states that he relies upon the entire record certified by the Clerk of the United States Board of Tax Appeals to this Court, and directs that said record so certified be printed as the record on review.

Respectfully submitted, J. P. Wenchel, Chief Counsel, Bureau of Internal Revenue.

Statement of Service

A copy of this designation of portion of the record to be printed was mailed to Robert C. Foulston, Esq., Wichita, Kansas, attorney for respondent on review this date, April 30, 1942.

Chas. E. Lowery, Special Attorney, Bureau of Internal Revenue.

[File endorsement omitted.]

[fol. 2] IN UNITED STATES CIRCUIT COURT OF APPEALS

STATEMENT OF POINTS RELIED UPON BY PETITIONER, CASE No. 2589—Filed July 22, 1942

Comes now the petitioner on review herein, and makes this concise statement of points upon which it intends to rely upon review herein:

(1) The United States Board of Tax Appeals erred in affirming the determination of the Commissioner of Internal Revenue of a deficiency in the 1935 income tax return of appellant.

(2) The decision and judgment of the United States Board of Tax Appeals is contrary to law and is contrary to and is not supported by either the undisputed evidence herein or the findings of fact of said United States Board of Tax Appeals.

(3) Under the undisputed facts herein and under the United States Board of Tax Appeals' own findings of fact, the said Board erred in holding that the petitioner received a refund of processing taxes and in including such refund in the income of the petitioner for the fiscal year ended December 31, 1935.

(4) The United States Board of Tax Appeals erred in holding or basically assuming that the burden was upon petitioner affirmatively to establish that petitioner did not receive a refund of processing taxes paid during the year 1935.

(5) The United States Board of Tax Appeals erred in not giving final, controlling, and conclusive weight to the closing agreement (petitioner's Exhibit "1") entered into between petitioner and respondent.

(6) The United States Board of Tax Appeals found that the petitioner's Title VII refund was $15,928.82 and interest thereon in the amount of $4,546.06, or a total of $20,474.88, which finding was unsupported by any evidence, and the Board erred in so finding.

(7) The Board erred as a matter of law in finding the processing tax refund was in the total amount of $20,474.88, and that the petitioner's unjust enrichment tax under Title III of the Revenue Act of 1936 was $36,880.21.

[fol. 3] (8) The Board's finding that the petitioner's Title III *injust* enrichment tax of $36,880.21 was unsupported by any evidence, and the verdict erred in so finding.

(9) The Board in finding that the petitioner received a refund of $20,474.88, including interest, disregarded all the positive and affirmative evidence submitted by petitioner with respect to the payment of its Title III tax.

(10) The Board erred in holding and deciding that an alleged refund of $20,474.88 should be included in the taxable income of petitioner for the year ending December 31, 1935.

(11) The Board erred in holding that there is a deficiency in income tax of $496.73 due from the petitioner for the calendar year 1935.

Carl T. Smith, Attorney for Petitioner on Review.

In United States Circuit Court of Appeals

Designation of Portion of Record to be Printed, Case No. 2589—Filed July 22, 1942

Comes now the petitioner on review herein, and complying with the rules of this Court pertaining to the designation of the portion of the record to be printed, states that it relies upon the entire record certified by the clerk of the United States Board of Tax Appeals, to this Court, and directs that said record so certified be printed as the record on review, together with the petitioner's statement of points relied upon in this appeal, and any and all orders enlarging the time for the docketing of the within appeal, this designation, and petitioner's proof of service upon counsel for respondent of this designation and of said statement of points relied upon in this appeal.

Respectfully submitted, Carl T. Smith, Attorney for Petitioner on Review.

[File endorsement omitted.]

[fol. 4] In United States Circuit Court of Appeals

Order Extending Time for Docketing Cause, Case No. 2589

Forty-fourth Day, March Term, Saturday, July 18th, A. D. 1942. Before Honorable Orie L. Phillips, Circuit Judge, and Honorable J. Foster Symes, District Judge.

This cause came on to be heard on the motion of petitioner for leave to docket the cause and file the transcript of the record herein out of time and was submitted to the court. On consideration whereof, it is now here ordered by the court that said motion be and the same is hereby granted and that the cause may be docketed and the transcript of the record filed instanter, which is accordingly done.

In United States Circuit Court of Appeals

Stipulation as to One Record, Cases Nos. 2556 and 2589—Filed September 28, 1942

The undersigned counsel for Guy T. Helvering, Commissioner of Internal Revenue, Petitioner on Review in case No. 2556, and Respondent on Review in case No. 2589, by his respective counsel hereunto signing, and The Security Flour Mills Company, Respondent in case No. 2556, and Petitioner in case No. 2589, desiring to avoid multiplicity of records on appeal herein, do hereby stipulate and agree that there be one record on appeal for the respective undersigned appellants, and that the argument of these appeals of the undersigned appellants be heard by this Court on the said single record.

It is further stipulated by the parties hereto that the cost of printing said record shall be borne and paid for by the parties hereto in equal proportions. That is to say, that The Security Flour Mills Company shall pay one-half of said cost of printing said record and one-half thereof shall be charged to the Department of Justice.

Samuel O. Clark, Jr., Assistant Attorney General, Department of Justice, Washington, D. C., for the Commissioner of Internal Revenue.

Robert C. Foulston, of Wichita, Kansas, Counsel for The Security Flour Mills Company.

[File endorsement omitted.]

[fol. 4a] [Caption omitted]

[fol. 5] BEFORE UNITED STATES BOARD OF TAX APPEALS

THE SECURITY FLOUR MILLS COMPANY, Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE, Respondent

Docket No. 90137

Appearances—For Taxpayer: Vincent A. Smith, C. P. A., Wm. H. Moberly, C. P. A., Robert C. Foulston, Esq., Harry E. Lansford, Esq., Parry Barnes, Esq.; For Commissioner: R. P. Hertzog, Esq., J. Y. Porter, Esq., W. V. Crosswhite, Esq.

DOCKET ENTRIES

1937

Aug. 9. Petition received and filed. Taxpayer notified. Fee paid.

Aug. 9. Copy of petition served on General Counsel.

Aug. 31. Answer filed by General Counsel.

Sept. 3. Copy of answer served on taxpayer.

Sept. 20. Motion for circuit hearing at Wichita, Kansas, of Kansas City, Mo., filed by taxpayer. 9/22/37 granted

1939

Sept. 22. Hearing set Nov. 27, 1939, at Kansas City, Mo.

Oct. 13. Motion for leave to file amended answer, amended answer lodged, filed by General Counsel.

Oct. 16. Motion for leave to file amended answer granted.

Nov. 6. Notice of appearance of Robert C. Foulston, Harry ~~E.~~ Lansford, Vincent A. Smith and Parry Barnes as counsel filed.

Nov. 6. Reply to amended answer filed by taxpayer.

Nov. 6. Motion for leave to file amended petition filed by petitioner.

Nov. 6. Amended petition lodged.

Nov. 6. Copy of reply served on General Counsel.

Nov. 10. Hearing set Nov. 27, 1939, on motion in Kansas City, Mo., 11/10/39 copy served.

[fol. 6]

1939		
Nov.	28.	Hearing had before Mr. Arnold on merits. Submitted. Continued to 11/29/39 for the purpose of receiving reply. Amended petition. Answer to amended and supplemental petition filed. Copy served. Stipulation as to facts and reply to amended petition filed. Copy served. Petitioner's brief due 1/15/40—respondent's 2/13/40—reply 2/28/40.
Dec.	14.	Transcript of hearing of 11/28/39 filed.
1940		
Jan.	9.	Motion for extension to Feb. 12, 1940, to file brief filed by taxpayer. 1/10/40 granted.
Feb.	6.	Brief filed by taxpayer. 2/6/40 copy served.
Mar.	13.	Brief filed by General Counsel.
Apr.	8.	Motion for extension of three days to file reply brief filed by taxpayer. Granted and extended to 4/13/40.
Apr.	13.	Reply brief filed by taxpayer. 4/15/40 copy served.
Apr.	15.	Copy of motion served on General Counsel.
Aug.	30.	Order that proceeding be restored to the Washington calendar of 9/18/40 at which time the parties may submit further testimony showing the manner in which the proceeding taxes were deducted for 1935, unless prior to that date the facts are presented in the form of a stipulation duly signed by respective parties entered.
Sept.	12.	Motion that Board enter an order extending the time when this proceeding shall be restored to the Washington calendar and that such date of restoration be fixed as October 2, 1940, instead of September 18, 1940, filed by General Counsel. Granted.
Oct.	1.	Stipulation of facts filed.
Oct.	2.	Hearing had before Mr. Arundell on the merits. Submitted heretofore. For further testimony unless stipulation of facts have been filed. Stipulation of facts filed Oct. 1, 1940.

1941

Nov. 12. Findings of fact and opinion rendered, Mellott. Decision will be entered under Rule 50. 11/12/41 copy served.

[fol. 7]

Dec. 24. Agreed computation of deficiency filed.

Dec. 29. Decision entered, Mellott, Div. 11.

1942

Feb. 11. Petition for review by U. S. Circuit Court of Appeals, 10th Circuit with assignments of error filed by taxpayer.

Feb. 12. Proof of service filed.

Mar. 26. Petition for review by U. S. Circuit Court of Appeals, 10th Circuit filed by General Counsel.

Apr. 2. Proof of service filed.

Apr. 13. Proof of service filed.

Apr. 17. Statement of points filed by General Counsel with statement of service by mail thereon.

Apr. 17. Designation of record filed by General Counsel with statement of service by mail thereon.

Before United States Board of Tax Appeals

Amended and Supplemental Petition—Filed November 28, 1939

The above petitioner, The Security Flour Mills Company, hereby files this, its amended and supplemental petition in the above-matter, for redetermination of the deficiency set forth by the Commissioner of Internal Revenue in his notice of deficiency (IT:E:3 JTA-90D), dated June 21, 1937, and as the basis for such proceedings, alleges as follows:

(1) The petitioner is a corporation, organized and existing under and by virtue of the laws of Kansas, with principal office at Abilene, Kansas.

(2) The notice of deficiency (copy of which is attached and marked Exhibit "A") was mailed to the petitioner on June 21, 1937.

(3) The taxes in controversy are income and excess profits taxes for the calendar year ended December 31, 1935,

in the amount of Fourteen Thousand Seven Hundred Two and 48/100 Dollars ($14,702.48) covering income taxes and Three Thousand *Eight*-eight Hundred and 80/100 Dollars ($3,088.80) covering excess profits taxes for said year.

(4) The determination of the tax set forth in the notice of deficiency is based upon the following errors:

[fol. 8] (4-a) The Commissioner of Internal Revenue erred in disallowing as a deduction from gross income the amount of One Hundred One Thousand Seven Hundred Eighty-three and 89/00 Dollars ($101,783.89) (said amount having been ascertained since the filing of the petition herein to be the actual amount of impounded funds and accrued processing taxes due and payable as at December 31, 1935), which sum represents so-called processing taxes which were sought to be exacted from the petitioner under the terms of the Agricultural Adjustment Act during that period beginning May 1, 1935, and ended December 31, 1935, and impounded during the pendency of an injunction proceeding under the order of the District Court of the United States, for the District of Kansas, Second Division, of which sum the petitioner became possessed upon rendition of final judgment in said cause in the amount of Ninety-three Thousand Nine Hundred Seventy-four and 40/100 Dollars ($93,974.40) and taxes sought to be imposed under said Agricultural Adjustment Act for the month of December, 1935, but not paid to the Treasury of the United States because of the decision of the Supreme Court of the United States in the case of United States v. Butler, et al., 297 U. S. 1, 80 L. ed. 477, in the net sum of Seven Thousand Eight Hundred Nine and 49/100 Dollars ($7,809.49), the total of said two sums being One Hundred One Thousand Seven Hundred Eighty-three and 89/100 Dollars ($101,783.89).

That in the succeeding paragraphs of this amended and supplemental petition, more particular reference is made to the facts, circumstances and conditions relating to said items, which allegations of fact pertaining thereto are incorporated in this paragraph as a part thereof as fully as if restated herein.

(4-B) As an alternate to the facts set forth in the preceding paragraph (4-a), in event that the determination of the Commissioner of Internal Revenue relating thereto

under said paragraph are sustained by the Board of Tax Appeals, and also supplementing said paragraph (4-a) above, and without regard to what decision shall be reached by the Board of Tax Appeals, or in final decision under said paragraph, the Commissioner of Internal Revenue erred, [fol. 9] (1) in failing to allow and treat as a deduction from gross income the sum of Forty-five Thousand Eight Hundred Sixty-five and 90/100 Dollars ($45,865.90), which sum was actually paid to certain vendees of the petitioner to whom the petitioner was obligated under agreements, arrangements, conditions and contracts hereinafter more specifically alleged (the exact amount of which reimbursements which said petitioner was liable to make and did make, having been determined as aforesaid, since the filing of the original petition herein), and (2) in not adjusting the gross income of the petitioner by a diminution thereof in the amount of Forty-five Thousand Eight Hundred Sixty-five and 90/100 Dollars ($45,865.90) so as to reflect true income and, (3) in failing to give effect to the recognized liabilities of petitioner's to its vendees in order to properly reflect income and, (4) in failing to give due and proper effect to the requirements of Sections 41, 42 and 43 of the Revenue Act of 1934 which require the Commissioner to consider credits and deductions for the taxable year in which 'paid or accrued' or 'paid and incurred,' dependent upon the method of accounting upon the basis of which the net income is computed and in so disregarding the mandatory provisions of said Sections 41, 42 and 43 as to distort and improperly reflect petitioner's income for said period, all as more fully set forth herein.

(4-c) The Commissioner further erred in the failure to allow adjustment in the value of the inventory of flour on hand as of December 31, 1935, due to further reduction in the amount of processing taxes included in inventory as of that date, in the amount of Two Hundred Ninety-seven and 32/100 Dollars ($297.32) to which the petitioner was entitled in order to reflect income.

That the petitioner withdraws the assignment of error contained in paragraph (4-c) of its original petition relating to the disallowance of One Thousand Four Hundred Four and 8/100 Dollars ($1,404.08) for certain expenses of litigation, attorneys fees, etc.

(4-d) Petitioner further alleges that if the petitioner is allowed the deductions for processing taxes set forth in (4-a) above, and to which it may be properly entitled for [fol. 10] the year 1935, then the petitioner alleges that to the best of its knowledge and belief, it is entitled to refund of income taxes actually paid for said year and if upon final decision of the United States Board of Tax Appeals for said reason overassessment results, then the petitioner makes a claim for such overassessment and asks the Bureau to determine that this petitioner is entitled to a refund in such amount as it has been overtaxed.

(5) The facts upon which the petitioner relies as the basis of this proceeding are as follows:

(5-a-1) The Security Flour Mills Company, petitioner herein, at all times material, conducted a flour milling business at Abilene, Kansas; said mill being located in what is known as the wheat belt of Kansas, and was in competition with a large number of other mills located in said territory. That early in the spring of 1935, certain publicity was given to some litigation instituted by various processors throughout the United States challenging the constitutionality of the Agricultural Adjustment Act. From time to time such discussion become more definite and in the month of April, 1935, various milling institutions throughout the United States instituted actions to enjoin the collection of said processing taxes. That thereafter, in the spring of 1935, various milling companies in the state of Kansas instituted actions in the United States District Court for the purpose of enjoining the collection of processing taxes. That during said period of time, the petitioner herein was issuing confirmation under what is known as a Millers National Federation Uniform Sales contract. That as a result of this discussion and the filing of suits by competitors of this petitioner, the petitioner sought advice of counsel concerning said matters, and also concerning the Millers National Federation Uniform Sales Contract. That counsel for the petitioner recommended that in order to protect the petitioner and its vendees in the event the act should be declared unconstitutional, that an action be instituted for that purpose, and also advised the petitioner that in the judgment of counsel, the Millers National Federation Uniform Sales Contract being then used by the petitioner did not relate to

or in any manner affect the rights of vendees or the peti- [fol. 11] tioner in event the Agricultural Adjustment Act should be declared unconstitutional, but relates only to the question of administrative or other changes and the amount of the tax postdating the date of its execution prior to the shipment of flour thereunder.

That during said time, frequent inquiries were made by various vendees of the petitioner in connection with the sale and purchase of flour and mill products as to what the attitude of the petitioner would be in event injunction proceedings were effective. That there were many conditions and circumstances which made it impossible for the petitioner to make an agreement with the customers in the exact terms of dollars and cents which would be refunded to such customers, but with certain customers who had been purchasers of the petitioner for a long period of time, the officers and sales department of the petitioner advised such customers that when the matter was finally determined, that such customers would be treated fairly by the petitioner, and the attention of such vendees was called to the fact that the petitioner had been doing business with them for a long period of time and that they could depend upon fair treatment when the facts were finally known, and the ability of the petitioner with reference to making refunds could be definitely determined.

In frequent instances, the vendees, before placing orders for flour or other milled products, inquired of the petitioner as to what its attitude would be in event of the successful prosecution of such proceedings, and it became and was the established practice of this petitioner to advise such vendees that they would be treated fairly when the facts had been finally determined.

(5-a-2) That thereafter, on the 29 day of June, 1935, this petitioner, through its counsel, caused to be instituted in the District Court of the United States in and for the District of Kansas, an action entitled, "The Security Flour Mills Company, plaintiff, vs. H. D. Baker, Individually, and as Collector of Internal Revenue for the District of Kansas, defendant," being numbered in Equity No. 718-N, wherein this petitioner sought an injunction against the Collector [fol. 12] of Internal Revenue against the collection and im-

position of the so-called processing taxes under the terms of the Agricultural Adjustment Act.

That on the 24 day of July, 1935, a temporary injunction was issued by the Judge of said Court, enjoining the collection of said tax on condition that in lieu of bond, the plaintiff would file informative returns with the Collector of Internal Revenue, and would deposit in The Fourth National Bank in Wichita, Kansas, a sum of money equal to the tax otherwise due as shown by such returns. That the bill of complaint filed in said suit, among other things, alleged:

"* * * the purchasers of flour and processed products from the plaintiff have indicated their intention to resist their contracts with this plaintiff and with other commercial mills likewise situated because of the alleged unconstitutionality of said Act, and throughout the milling industry notices have been given, and will hereafter be given in ever increasing numbers, demanding of the plaintiff and other milling institutions refunds to them of an amount equal to the assessment and so-called tax imposed upon the milling of wheat, (whether the same was passed on by the plaintiff or not) and have likewise demanded that refunds be obtained to the use and benefit of such purchasers of flour and milled products;"

That thereafter, an Amended and Supplemental Bill of Complaint was filed, which alleged among other things, the following:

"Plaintiff's customers are continually calling to plaintiff's attention the issuance of such injunctions to plaintiff's competitors, and to the fact that plaintiff's competitors are affording protection to their customers against the continued imposition of such purported processing taxes. They are demanding and will continue to demand, that plaintiff protect them against the continued imposition of such processing taxes, and are threatening to, and will, refuse to deal further with plaintiff unless it affords such protection to its own customers. Plaintiff's customers are continually threatening to deduct from plaintiff's invoices attempted estimate of the amount of the so-called process-[fol. 13] ing tax paid by plaintiff in connection with the processing of its products sold to such customers. Failure of plaintiff to withhold payment of such taxes and thereby protect and preserve the rights of its customers to have

the legality and constitutionality of such taxes determined by the Court will cause great ill will to plaintiff on the part of its customers and will result in great and irreparable loss to plaintiff, all to plaintiff's irreparable injury for which plaintiff has no adequate remedy at law. Plaintiff is unable adequately to protect its said customers by the payment of the said processing taxes because of the inadequacy of the legal remedy to secure refunds as hereinbefore set forth."

That in said action, the petitioner herein, at the inception of said litigation, recognized the demands of its customers and vendees as above stated. That the said petitioner, from time to time, deposited moneys as required by said interlocutory order in The Fourth National Bank in Wichita, Wichita, Kansas, from the effective date of said order, to-wit: May 1, 1935, until the determination of the unconstitutionality of the Agricultural Adjustment Act decided by the Supreme Court of the United States on the 6 day of January, 1936, except that said petitioner did not deposit in said bank the sum of Seven Thousand Eight Hundred Nine and 49/100 Dollars ($7,809.49), which sum was not paid to the Collector of Internal Revenue, and was withheld because of said decision. That almost immediately upon the decision by the Supreme Court of the United States, as aforesaid, certain vendees of the petitioner, or other mills likewise prosecuting said suits, filed petitions of intervention seeking to have said funds thus on deposit in The Fourth National Bank in Wichita, sequestered and administered under the order of the Court for the benefit of said vendees. That said petitioner instituted said action for the reasons appearing therein and filed a brief with the Judge of said Court, which brief contained, among others, the following statements: That during all of said period of time, and from time to time, in dealing with said vendees and customers, the petitioner advised said customers that it was unable to agree upon an exact amount which would be repaid by said petitioner, [fol. 14] but said petitioner agreed, in substance, that when the rights of the parties were determined in said litigation, the various customers to whom said promises were made would be treated fairly and that The Security Flour Mills Company would do the right and fair thing with said customers. That all of said declarations, allegations and conduct of said petitioner were consistent with its understand-

ing and agreement with certain of its customers (those with whom refunds were made as hereinafter alleged) that it would treat such customers fairly and also that it would treat such customers as well as competitive milling companies would be able to and would do. That the vendees with whom settlement was ultimately made by said petitioner acted and relied upon the understanding, agreements and course of conduct herein recited and upon the past transactions and long course of business dealings between the petitioner and said vendees that it would ultimately, when the facts were known, treat the said vendees fairly.

That on the 28 day of February, 1936, the District Court of the United States made an order making permanent the injunction in said case and ordering the payment to this petitioner of said sum of Ninety-three Thousand Nine Hundred Seventy-four and 40/100 Dollars ($93,974.40) to be returned by the said bank to said petitioner.

(5-a-3) That this petitioner, consistent with its understanding, agreement and obligations to its various vendees, received said money from said bank, and opened a new account upon its books to which said sum was credited under the title of Reserve for Processing Tax Claims, etc. That at the time of the receiving of said funds from said The Fourth National Bank in Wichita, and at all times prior thereto, this petitioner recognized its obligation to certain of its vendees, and its liability to make refunds to them when and as the proper and fair amount of such refunds could be determined. That the matter of making said adjustments were delayed by several matters beyond the control of the petitioner, but among which was the filing of separate suits by certain vendees under the mistaken idea of the liability of the petitioner under the so-called Miller's National Federation Uniform Sales Contract, and by the filing of separate suits against either the peti- [fol. 15] tioner or other mills, likewise situated, seeking to sequester and administer said funds in separate suits and actions known as "class suits," all of which matters delayed the final determination of the fair and just settlement to be made by the vendees and the petitioner. That consistent with the attitude of the petitioner in its dealings with its vendees, and on the — day of December, and under the date of November 7, 1936, the petitioner mailed to its vendees and customers, particularly those with *hom*

settlements and adjustments were thereafter made, a letter, reading, in substance, as set forth in Exhibit "A" hereto attached; said Exhibit "A" being attached hereto, and made a part of this amended and supplemental petition as if fully set forth herein in full.

That from time to time during the year 1936, and in the year of 1937, while said petitioner was being delayed in the settlements to be made and which it recognized should be made to its customers, it received from time to time letters from said customers urging the petitioner to make adjustments of the liability of petitioner for processing taxes to such vendees during said injunction period and that from time to time thereafter, the petitioner advised said vendees of the difficulties it was encountering which delayed the settlement, but promising said vendees that they would be treated fairly and that The Security Flour Mills Company would do the right thing by said customers as soon as the rights and liabilities could be determined.

That during said time and from time to time during the time intervening between the final judgment in said suit, and the date upon which settlement was actually made, the petitioner, its officers, sales managers and representatives had frequent talks with the said customers and vendees in which the said representatives of said petitioner advised said vendees they would be treated fairly, and that The Security Flour Mills Company would do as well by its customers as other mills would do by their customers. That said petitioner had many conferences with said vendees, and discussed settlement.

(5-a-4) That during all the times from the date of the [fol. 16] receiving of said funds from said The Fourth National Bank, until the date upon which settlement was actually made, the petitioner continued to keep said funds in a reserve account for the benefit of its said vendees to the extent that settlement was thereafter to be made with such vendees. That thereafter, and during the year 1937, the said petitioner did finally settle with and pay to the said vendees in most instances a sum equal to One Dollar ($1.00) per barrel upon flour thus sold and shipped to the customer and vendee during the pendency of said injunction and prior to the 6 day of January, 1936. That the total amount of money paid to said vendees and charged to said separate account, as aforesaid, was the sum of

Forty-five Thousand Eight Hundred Sixty-five and 90/100 Dollars ($45,865.90). That until the time of the settlement of said controversies with said vendees to whom said petitioner was liable, it did not assert any right to, nor make claim to all of said vendees, but recognized that said funds were held to the extent and for the use and benefit of vendees to the amount that said petitioner was liable to them in the making of settlement, as aforesaid.

(5-a-5) That during all of said time the said petitioner was consistent in that it recognized its liability to make some satisfactory settlement with its vendees. That for the purpose of advising the Board of Tax Appeals as to the manner of keeping said account, a transcript of said account is hereto attached, marked Exhibit "C," and made a part of this petition.

(5-a-6) That this petitioner further alleges that in the making of said arrangements with its vendees, in receiving said moneys and crediting the same to said account and in making distribution thereof, it was consistent, and at all times recognized that it had a known liability to its vendees, although the amount was not immediately known. That said funds were held in said manner until said settlements were made and said petitioner at no time denied its liability to certain of its vendees in such amount as may be determined to be justly due and owing to them.

(5-a-7) Petitioner further states that in the keeping of [fol. 17] said account in the handling of said funds, and as was its right under the provisions of Section 41, 42 and 43 of the Revenue Act of 1934 to keep its accounts in such a manner as to fairly reflect income, that it did not assert ownership or title to such part of said funds as might be necessary for settlement with its customers, and that in the keeping of its books and records, as herein alleged, it did so in such a manner that said books and records would, in truth and in fact, reflect its income. That in accruing for the benefit of its customers that portion of the funds so received and held by said petitioner's vendees, the said petitioner kept its books and records so that they would properly reflect its obligations 'paid and accrued' or 'paid and incurred,' and adopted said method of accounting upon the basis upon which its net income was computed.

That said books and records as established, kept, maintained and adopted by said petitioner clearly reflected the income for the period in question, and for the Commissioner to assess an additional tax upon any other basis would distort, disrupt and fail to reflect the taxable income of this petitioner. That the petitioner alleges that its books and records in the handling of said matters did in fact properly reflect the income of this petitioner, and that any other manner of handling or dealing with said transaction would, in truth and in fact distort its income contrary to and in violation of the provisions of the statutes, laws and regulations relating thereto.

Petitioner further alleges that at all times herein material, for many years prior thereto, this petitioner kept its accounts upon an accrual basis, made its reports to the Bureau of Internal Revenue on such basis and has since so kept its books and records, and that at no time material herein has it ever kept its records upon a cash basis.

(6) The petitioner makes the facts herein alleged applicable to both its original assignment of errors as set forth in paragraph (4-a) above, and likewise applicable to the alternate paragraph (4-b) above to the same extent and in the same manner as if said facts were restated and realleged as to each of said original and alternate assignments.

[fol. 18] (7) With reference to assignment of error (4-c), the petitioner alleges the facts to be:

That the inventories apparently used by the Commissioner were the amounts of inventories upon the books at the end of said taxable year, to-wit: December 31, 1935, without making the proper allowance, adjustments and corrections therefor which should have been made due to the fact that the commodities shown by said inventory in truth and in fact contained inflated and improper amounts of inventory values due to the fact that there was included in said inventories the tax at the rate of One and 38/100 Dollars ($1.38) per barrel on such flour so inventoried; whereas, in fact, the Examiner in making his report to and the letter of deficiency by said Commissioner of Internal Revenue allows a reduction of but Two Thousand Four Hundred Fifty and 2/100 Dollars ($2,450.02), when in fact the proper adjustment in inventory should have been Two

Thousand Seven Hundred Forty-seven and 34/100 Dollars ($2,747.34), thus making an additional reduction in inventory and, therefore, reduction in gross income to which this petitioner is entitled.

Wherefore, petitioner prays that this Board may hear the proceedings and find and determine:

(a) That the petitioner is entitled to deduct from gross income in the taxable year in question, the amount of One Hundred One Thousand Seven Hundred Eighty-three and 89/100 Dollars ($101,783.89), being the amount of funds impounded which should not be held or determined to be a part of the gross income of the petitioner for the taxable year of 1935; the same being the amount of said impounded funds, plus the tax upon the processing by petitioner during the month of December, 1935, and which sum is not lawfully to be included within petitioner's income for said year.

(b) That as shown by the facts herein alleged, the amount of the petitioner's gross income for the year 1935 should be reduced by the amount of Forty-five Thousand Eight Hundred Sixty-five and 90/100 Dollars ($45,865.90) and its taxable income for said period accordingly reduced.

[fol. 19] (c) That the petitioner was, during, all times herein material, upon an accrual basis in reporting its taxable income, and that the manner of keeping its books and records properly reflect income of the petitioner, and that any change or other manner of handling said items would distort income and fail to reflect the taxable income of this petitioner.

(d) That the petitioner had a regular contractual and definite knowable, if not known, liability to its vendees, was obligated to and held for their use and benefit the said sum of Forty-five Thousand Eight Hundred Sixty-five and 90/100 Dollars ($45,865.90) thus paid to them, and that said item was not the income of this petitioner, nor was said sum the money of this petitioner, or otherwise to be included in law as a part of its gross income.

(e) That the payments by the petitioner to its vendees in the sum of Forty-five Thousand Eight Hundred Sixty-five and 90/100 Dollars ($45,865.90) be held and determined to be readjustment in original sales price and hence allocable to the year of sale and shipment.

(f) That the sum of Forty-five Thousand Eight Hundred Sixty-five and 90/100 Dollars ($45,865.90) reimbursements to its vendees, as herein alleged. was knowable, though not known liability in the year of sale and is, therefore, not properly to be included within the gross income of said petitioner for said year of 1935.

(g) That the petitioner be determined to be entitled to a reduction from gross income in the matter of its inventories on account of the facts herein alleged to the extent of Two Hundred Ninety-seven and 32/100 Dollars ($297.32).

(h) The petitioner further prays that the Board of Tax Appeals adjust and determine the true liability of said petitioner for income tax for the year 1935, and if the computation with the allowances herein requested result in an overassessment of such tax, then the Board [fol. 20] determine and adjust the amount of such overassessment to this petitioner in its order, judgment and findings.

Robert C. Foulston, Suit 608 Fourth National Bank Bldg., Wichita, Kansas; Vincent A. Smith, 307 Wheeler Kelly Hagny Building, Wichita, Kansas; Harry E. Lunsford, Parry Barnes, 21 West Tenth Street, Kansas City, Missouri, Attorneys for Petitioner.

[Verification omitted.]

EXHIBIT "A" TO AMENDED AND SUPPLEMENTAL PETITION

Treasury Department

Washington June 21, 1937

Office of Commissioner of Internal Revenue.

Address Reply to Commissioner of Internal Revenue and refer to

Security Flour Mills Co., Abilene, Kansas.

SIRS:

You are advised that the determination of your income tax liability for the taxable year(s) ended December 31, 1935, discloses a deficiency of $14,702.48 and that the determina-

tion of your excess-profits tax liability for the year(s) mentioned discloses a deficiency of $3,088.80 as shown in the statement attached.

In accordance with section 272(a) of the Revenue Act of 1934, notice is hereby given of the deficiencies mentioned. Within ninety days (not counting Sunday or a legal holiday in the District of Columbia as the ninetieth day) from the date of the mailing of this letter, you may file a petition with the United States Board of Tax Appeals for a redetermination of the deficiencies above stated.

Should you not desire to file a petition, you are requested to execute the enclosed form and forward it to the Commissioner of Internal Revenue, Washington, D. C., for the attention of IT;C:P-7. The signing and filing of this form will expedite the closing of your return(s) by permitting [fol. 21] an early assessment of the deficiencies, and will prevent the accumulation of interest, since the interest period terminates thirty days after filing the form, or on the date assessment is made, whichever is earlier.

Respectfully, Guy T. Helvering, Commissioner; by
Chas. T. Russell, Deputy Commissioner.

Enclosures: Statement, Form 870.

Exhibit "B" to Amended and Supplemental Petition

November 7, 1936.

To Our Customers:

This company became subject to and liable for wheat processing taxes on July 9, 1933, and paid such taxes to the Treasury Department of the United States until, when it became evident that it was possible to secure a restraining order preventing that collection of the tax until its constitutionality had been determined by the Supreme Court we applied for and secured our injunction.

The decision of the United States Supreme Court invalidating the Agricultural Adjustment Act and all taxes levied thereunder was made public on January 6, 1936, but in most cases several weeks elapsed before final ajudication of the status of unpaid taxes because of attempts of vendees to intervene and for other reasons. During this period it became increasingly evident that the Administra-

tion would make strong efforts to secure the passage of legislation which would accomplish the recapture of all or a major part of these unpaid taxes. As a result of the policies and announced desires of the Administration there was included in the Revenue Act of 1936 a section designated as 'Title III—Tax on Unjust Enrichment' (the so-called Windfall Tax) levying a tax 80% on that portion of unpaid processing taxes actually passed on by the processor, or, in the case of refunds and reimbursements by the processor to his vendees, of 80% of such amounts if passed on to the public or others by the vendee. The same th [fol. 22] is further expressed in the Revenue Act of 1936 in another section, Title VII, which provides that no refund of processing taxes actually paid will be made except to the extent that a processor can prove he actually bore the burden of such tax.

The Title of the 'Tax on Unjust Enrichment' and the principles of the refund adjustments offered by Title VII are derived from the accepted legal doctrine of unjust enrichment as applied by the United States Supreme Court to similar situations which have arisen with respect to Federal Excise Taxes in the past. Our understanding of this doctrine is that the law will not compel the recovery of amounts erroneously paid as taxes if the person seeking such recovery was not the person who actually bore the burden of the tax.

The provisions of the Windfall Tax section of the law and the regulations thereunder issued by the Commissioner of Internal Revenue are somewhat ambiguous and extremely complex. It appears to be the intent of the law that no refund by a processor to his vendee will be recognized unless based on a written agreement entered into prior to March 3, 1936, or paid before June 1, 1936, and then only if such refund is for the exact amount of tax passed on. The regulations appear to be somewhat more liberal than the law itself in this respect and, while the Treasury Department has issued a ruling to the effect that payments or credits to vendees who purchased flour under the standard Miller's National Federation sales contract (issued February 21, 1935, and July 3, 1935) will be recognized as payments made under a 'written agreement' as defined in the statute, the ruling does not conclusively state that payments made because of the existence of the standard sales contract will meet the requirements of the statute other-

wise than with respect to having been made in accordance with the terms of a written agreement. Furthermore, the ruling is an administrative one only and is subject to alteration, amendment or withdrawal by the same authority issuing it and can certainly have no effect in the event that any court of competent jurisdiction should hold to the contrary, no rulings or authoritative opinions are as yet available as to the effect on the income and excess profits [fol. 23] taxes of the processor of refunds or credits made in one year with respect to transactions occurring in a prior year, particularly where such refunds are made the basis of an agreement to settle other claims or disputed between the processor and his vendee.

The entire situation has been further complicated by the filing of 'class suits' against processors seeking to recover for customers as a class the full amount of unpaid processing taxes. The nature of these proceedings is that an attorney representing one or more vendees brings an action on behalf of his clients and asks that all similarly situated vendees of the defendant processor be included in the action. Attorneys' liens are then filed which seek to prohibit settlement with any vendee except through the attorney of record whether or not such vendee has any knowledge of the proceeding. These 'class suits' have been filed against many flour millers and if such action has been or should be taken against us it will obviously be impossible to take any settlement while such action is pending, anything to the contrary hereinafter stated notwithstanding.

We have given consideration to an attempt to define a proposed method of settlement with our customers through the medium of securing a 'closing agreement' with the Treasury Department. We were advised, however, by our attorneys and accountants that such an agreement, made in advance of the actual occurrence of the transactions involved, to permit the immediate repayment to vendees of a stated sum cannot possibly offer either to the processor or the vendee the degree of financial security requisite in the disbursement of the comparatively large sums involved since obviously such an agreement cannot relate to anything other than the definition of basic principles involved in the final settlement of various forms of tax liability after all transactions have been completed.

In spite of all the difficulties we have referred to, we believe that we have now developed a method of procedure which will offer a solution. We propose to make formal application to the United States Treasury Department for permission to make settlement with our flour-buying customers on the following basis:

[fol. 24] (a) We will prepare the *require-* 'Unjust Enrichment' or 'Windfall Tax' returns and have them examined and audited by the Treasury Department, in conjunction with our income and excess profits tax returns, for the purpose of securing final definition of our tax liability and the amount of unpaid processing taxes passed on to our customers.

(b) As such latter amount has been determined and accepted by the Treasury Department as the amount of 'Unjust Enrichment' on which we would be subject to tax, we shall request permission to refund the whole of such amount (less expenses incurred in connection therewith) to our customers who purchased the flour made from wheat with respect to which a tax was imposed but not paid (except flour of our manufacture in transit or otherwise included in customers' floor stocks on January 6, 1936), provided

1. That the Treasury Department will accept such repayment as an offset against 'Windfall' income and excess profits tax liabilities for the period during which the processing taxes were imposed but not paid and

2. That the customer will accept such basis of settlement as satisfaction of any claims he may assert with reference to such funds. In any case where the customer does not accept this basis, or in case the Treasury Department decides that where flour was sold without formal contract the customers has no interest in the funds, the eighty per cent tax will be paid to the Treasury.

(c) With respect to process taxes actually paid by us, it is not contemplated that you will be asked to waive any rights you may be legally able to assert in connection therewith, nor that we will waive any similar rights we may be able to assert. The provisions of Title VII preclude the possibility of the processor recovering any amount of taxes paid except such sums as he can prove were actually borne

by himself. If, however, Title VII should be declared unconstitutional, or if by any other means we can recover the entire amount of the taxes actually paid, we shall agree to settle with you with respect to those taxes on the same basis as hereinbefore described with respect to process taxes which were not paid. The validity of Title VII is now being contested in the Federal Courts.

[fol. 25] We feel that the method of settlement herein outlined is eminently fair inasmuch as the basis is to be finally determined in conjunction with the Treasury Department of the United States which is a party at interest inasmuch as any amount approved by them for refund to you is still subject to the eighty per cent Windfall Tax in your hands, and consequently we feel sure that every effort will be made by them to see that the amount finally determined upon is correct. We believe it hardly necessary to call to your attention the fact that the offer herein is made is a voluntary one on our part and is not to be construed as in any manner admitting any liability whatsoever to you or to any customer with respect to process taxes assessed or assessable against us whether or not such taxes were paid.

We regret very much that this entire matter has been a possible source of irritation to you. We trust that you will realize that it has been a tremendous burden to us and a source of considerable expense and has consumed a large amount of our time. We are under the necessity of protecting ourselves from further losses and, while we are extremely anxious to have the entire matter adjusted at the earliest possible moment, we believe that it will require the fullest degree of co-operation among yourselves, ourselves and the Treasury Department of the United States in order to accomplish this end.

Exhibit "C" to Amended and Supplemental Petition

The Security Flour Mills Company, Abilene, Kansas, Analysis of Reserve for Processing Tax Claims, Etc., Account.

	Debit	Credit
Excess of processing tax accrued on shipments to Illinois state institutions, not paid to Collector		$ 92.64
Excess of processing tax accrued and charged to operations for July, 1935, not impounded		206.00
Excess of processing tax accrued and charged to operations for August, 1935, not impounded		195.00
[fol. 26] Excess of processing tax accrued and charged to operations for October, 1935, not impounded		690.00
Amount of processing accrued and charged to operations for December, 1935, not impounded		9,896.66
Dec. 31, 1935 Balance		11,080.30
Refunds to vendees and adjustment of sales price of shipments in transit on Jan. 6, 1936. These refunds made during January and February, 1936	$3,181.59	
Feb. 12, 1936 Return of impounded funds from The Fourth National Bank, Wichita, Kansas, previously charged to operations		93,974.40
Total expenses paid chargeable to this account, including legal fees, accounting fees, court costs, etc., paid during 1936	3,278.34	
Mar. 14, 1936 Tax in inventory as of Dec. 31, 1935 credited to inventory account	2,573.27	
	9,033.20	105,054.70
Dec. 31, 1936 Balance—(Forward)		$ 96,021.50

Exhibit C (Page 2).

The Security Flour Mills Company, Abilene, Kansas, Analysis of Reserve for Processing Tax Claims, Etc., Account.

	Debit	Credit
Dec. 31, 1936 Balance—(Forward)		$96,021.50
May 18, 1937 Refund from vendor on flour purchased during injunctive period		200.00
[fol. 27] Refunds made during 1937 to vendees on shipments of flour made during the injunctive period	$41,879.50	
Total expenses paid during 1937	2,651.01	
	44,530.51	96,221.50
Dec. 31, 1937 Balance		51,690.99
Total expenses paid during 1938	529.53	
Refunds made during 1938 to vendees on shipments of flour made during the injunctive period	1,511.37	
	2,040.90	51,690.99
Dec. 31, 1938 Balance		49,650.09
Total expenses paid during 1939	2,954.77	
Payment of Title III tax, net, under Section 506	16,405.33	
Balance transferred to Surplus Account	30,289.99	
	$49,650.09	$49,650.09

Summary of Reimbursements to vendees on shipments of flour made during the injunctive period:	Applicable to Shipments made during Year Ended December 31	
	1935	1936
Paid during year 1936	$ 2,475.03	$ 706.56
Paid during year 1937	41,879.50	None
Paid during year 1938	1,511.37	None
	$45,865.90	$ 706.56

[File endorsement omitted.]

[fol. 28] BEFORE UNITED STATES BOARD OF TAX APPEALS

ANSWER TO AMENDED AND SUPPLEMENTAL PETITION—Filed November 28, 1939

Comes now the Commissioner of Internal Revenue, by his attorney, J. P. Wenchell, Chief Counsel, Bureau of Internal Revenue, and for answer to the amended and supplemental petition filed in the above-entitled proceeding admits, denies and avers as follows:

(1) Admits the allegations contained in paragraph (1) of the amended and supplemental petition.

(2) Admits that the notice of deficiency was mailed to the petitioner on June 21, 1937, but denies that a copy thereof was attached to the amended and supplemental petition.

(3) Admits that the taxes in controversy are income and excess profits taxes for the calendar year ended December 31, 1935. Denies the remaining allegations contained in paragraph (3) of the amended and supplemental petition.

(4-a) to (4-d), inclusive. Denies that the Commissioner erred as alleged in subparagraphs (4-a) to (4-d), inclusive of paragraph (4) of the amended and supplemental petition.

(5-a-1) Admits that the petitioner, at all times material herein, conducted a flour milling business at Abilene, Kansas. Denies the remaining allegations contained in subparagraph (5-a-1) of paragraph (5) of the amended and supplemental petition and avers that the said matter is incompetent, irrelevant and immaterial in that it does not tend to prove or disprove any issue in this proceeding.

(5-a-2) Admits that on the 29th day of June, 1935, this petitioner caused to be instituted in the District Court of the United States for the District of Kansas, an action entitled, "The Security Flour Mills Company, plaintiff, vs. H. D. Baker, Individually, and as Collector of Internal Revenue for the District of Kansas, defendant," wherein the plaintiff sought an injunction against the said Collector of Internal Revenue to enjoin the further collection of processing taxes under the terms of the Agricultural Adjustment Act. Admits that on the 24th day of July, 1935, a temporary injunc-

tion was issued by the Judge of said Court, enjoining the further collection of said tax on condition that in lieu of bond the plaintiff would file information returns with the Collector of Internal Revenue and would deposit in The [fol. 29] Fourth National Bank in Wichita, Wichita, Kansas, a sum of money equal to the tax otherwise due as shown by such returns. Admits that from May 1, 1935, the effective date of said order, to and including December 31, 1935, the petitioner paid into said Fourth National Bank in Wichita, Wichita, Kansas, the total sum of $93,974.40. Admits that on the 28th day of February, 1936, there was entered by the District Court in the proceeding herein above mentioned an order making permanent the injunction in said case and directing the return and repayment to the petitioner of the sum of $93,974.40, therein before held by The Fourth National Bank in Wichita, Wichita, Kansas. Denies the remaining allegations contained in subparagraph (5-a-2) of paragraph (5) of the amended and supplemental petition.

(5-a-3) to (5-a-7), inclusive. Denies the allegations contained in subparagraphs (5-a-3) to (5-a-7), inclusive, of paragraph (5) of the amended and supplemental petition.

(6) Admits the matter set forth in paragraph (6) of the amended and supplemental petition.

(7) Denies the allegations contained in paragraph (7) of the amended and supplemental petition.

(8) Further answering the amended and supplemental petition for an affirmative defense, respondent alleges that he erroneously computed and determined petitioner's income and excess-profits taxes for the taxable year ended December 31, 1935. That the true deficiency for the said year is $15,066.75 in income tax and $3,221.27 in excess-profits tax, as is shown by the statement attached hereto marked respondent's exhibit No. 1 and by reference made a part hereof.

(9) That the respondent relies upon the following facts:

A. That the petitioner filed a claim (No. F 1269) with the Commissioner of Internal Revenue in accordance with Title VII of the Revenue Act of 1936 for a refund of certain processing taxes paid to the Collector of Internal Revenue under the Agricultural Adjustment Act.

B. That the petitioner was allowed a refund by the Commissioner of said processing taxes in the total prin- [fol. 30] cipal amount of $15,928.85, of which latter amount $2,649.25 pertained to the taxable year 1935.

C. That the said amount of $2,649.25 was entered on the petitioner's books as an accrued liability for the year 1935, and was actually paid to the Collector of Internal Revenue within the latter year.

D. That the said amount of processing taxes ($2,649.25) was claimed and allowed as a deduction in the petitioner's Federal income tax return for the taxable year 1935.

E. That the said amount of processing taxes ($2,649.25) was not a proper deduction in the petitioner's Federal income tax return for the taxable year 1935.

Wherefore, it is prayed that the Board redetermine the amounts of the deficiency in income and excess-profits tax involved in this proceeding for the taxable year ended December 31, 1935, to be equal to the amounts determined by the Commissioner plus the additional amounts arising from the correction of the error committed by the Commissioner. Claim is hereby asserted for the increased deficiency of $15,066.75 in income tax and $3,221.27 in excess-profits resulting from said redetermination in lieu of the amounts previously determined by the Commissioner.

J. P. Wenchel, R. P H, Chief Counsel, Bureau of Internal Revenue.

Of Counsel: R. P. Hertzog, Division Counsel; J. Y. Porter, Special Attorney, Bureau of Internal Revenue.

Exhibit No. 1 to Answer

The Security Flour Mills Company

Recomputation of Income and Excess-Profits Taxes for the Taxable Year Ended December 31, 1935.

Net income as shown in statutory notice dated June 21, 1937	$114,050.23
Add:	
Refund of processing taxes	2,649.25
Net income as corrected	$116,699.48

[fol. 31] Tax Computation

Income Tax

Net income as corrected	$116,699.48
Tax at 13¾%	16,046.18
Tax assessed, #401621	979.43
Deficiency	15,066.75

Excess-Profits Tax

Net income as corrected	$116,699.48
Less: 12½% of declared value of capital stock	52,274.16
Balance taxable at 5%	64,425.32
Tax at 5%	3,221.27
Tax assessed	None
Deficiency	3,221.27

[File endorsement omitted.]

Before United States Board of Tax Appeals

Reply of Petitioner to the Answer of the Respondent to Amended Supplemental Petition—Filed November 29, 1939

Comes now the petitioner, The Security Flour Mills Company, and for its reply to the answer of the respondent to amended and supplemental petition, and with particular reference to the new matter contained therein, states:

First: For reply to Paragraph 8, the petitioner admits that the respondent erroneously computed and determined

petitioner's income and excess profits taxes for the taxable year ended December 31, 1935, but denies that the true deficiency for the said year is $15,066.75 in income tax and $3,221.27 in excess profits tax, as shown by the statement attached to said answer and marked respondent's Exhibit "1" and made a part of said answer, in that the correct deficiency of petitioner for income and excess profits taxes for the taxable year ended December 31, 1935, is as claimed and set forth in the amended and supplemental petition of the petitioner.

Second: With reference to Paragraph (9-A), the peti- [fol. 32] tioner admits that it filed a claim (F-1269) with the Commissioner of Internal Revenue in accordance with Title VII of the Revenue Act of 1936 as alleged in said Paragraph (9-A).

Third: The petitioner denies the allegation of Paragraph (9-B) of said answer in the sum of $15,928.85, or that the sum of $2,649.25 pertained to the taxable year 1935, and in explanation of said denial the petitioner states that it entered into a closing agreement under Section 506 of Title III of the Revenue Act of 1936, as shown by the copy of said closing agreement attached to the stipulation of facts and made a part thereof. That the petitioner received a notice and demand pursuant to said agreement in which an amount of $16,405.33 was demanded of said petitioner, as shown by Exhibit "E" attached to said stipulation of facts. Said demand recited "1935 unjust enrichment tax." That said petitioner paid an amount shown by said notice and demand, as shown by said exhibit.

The petitioner, further replying, admits that a summary accompanying said closing agreement was considered by the Commissioner in connection with his determination as to whether he would or would not make the settlement of the tax liability as set forth in said closing agreement; but petitioner alleges that said schedule does not constitute any part of said agreement. Petitioner further alleges that the Commissioner considered the tax liability of the petitioner for unjust enrichment tax arising under said Title III of the Revenue Act of 1936 in conjunction with said claim for refund under Title VII. That in making said closing agreement, the Commissioner considered the liability of said petitioner for unjust enrichment tax and such claim under

Title VII as one case, and entered into such written agreement under Section 506 of Title III of the Revenue Act of 1936 for the settlement of the tax liability in such case upon the payment by the petitioner of the amount specified in said agreement, to-wit: the sum of $16,405.33. That such agreement constitutes a final settlement of the liability for tax and the claim for refund covered thereby.

That, for the reasons set forth in this paragraph and with the explanation therein contained, the petitioner denies Paragraphs (9-C), (9-D) and (9-E) of said answer.

[fol. 33] Wherefore, petitioner prays a determination, judgment and finding as claimed and demanded in its amended and supplemental petition.

For like reason, petitioner prays that the claim affirmatively asserted by the respondent in its answer to amended and supplemental petition shall be denied.

Robert C. Foulston, Suite 608 Fourth National Bank Building, Wichita, Kansas; Vincent A. Smith, 307 Wheeler Kelly Hagny Building, Wichita, Kansas; Harry E. Lunsford, Parry Barnes, 21 West Tenth Street, Kansas City, Missouri, Attorneys for Petitioner.

[File endorsement omitted.]

Before United States Board of Tax Appeals

Findings of Fact and Opinion—Promulgated November 12, 1941

1. Petitioner, after receiving in 1936 a substantial amount of processing taxes impounded in court prior to invalidation of the act under which such taxes had been imposed, reimbursed some of its vendees for a portion of the processing tax which had been included in the price of wheat products sold to them in 1935. Held, following Cannon Valley Milling Co., 44 B. T. A. 763, that the amounts so paid to vendees are deductible in computing petitioner's net income for 1935.

2. Under a closing agreement, executed in 1939, settling petitioner's liability for tax on unjust enrichment and its claim for refund, a portion of the processing tax, which had been deducted from gross income for 1935, was re-

funded. Held, following E. B. Elliott Co., 45 B. T. A. 82, that, inasmuch as the year 1935 is open, adjustment of the deduction for taxes should be made for that year.

Robert C. Foulston, Esq., Harry E. Lunsford, Esq., and Vincent A. Smith, C. P. A., for the petitioner.

R. P. Hertzog, Esq., and J. Y. Porter, Esq., for the respondent.

[fol. 34] The Commissioner made several adjustments to the net income reported by petitioner in its income and excess profits tax return for the calendar year 1935 and determined a deficiency in the aggregate amount of $17,791.28, $14,702.48 being income tax and $3,088.80 excess profits tax. In an amended answer he asserts a claim for an increased deficiency alleging that the correct amount is $18,288.02, of which $15,066.75 is income tax and $3,221.27 is excess profits tax.

Several of the adjustments made by the respondent are conceded by petitioner to be correct. The issues to be decided arise in connection with certain processing taxes. Between May and December in 1935, processing taxes amounting to $105,054.70 were accrued upon petitioner's books and deducted in computing its income. Most of this amount had been impounded under order of court and, during the succeeding taxable year, was returned to petitioner following a judicial determination that the processing tax act was invalid. During 1936, 1937, and 1938, $45,865.90 was paid over by petitioner to its vendees to reimburse them for the processing taxes which they had paid to petitioner and which petitioner had not been required to pay over to the Government. The first question is whether the sum of $45,865.90 constitutes, and may be allowed as, a deduction from petitioner's gross income for 1935. The second question is whether petitioner's tax liability for 1935 may be increased by reason of a closing agreement, executed by the parties in April 1939, under section 506 of the Revenue Act of 1936, settling petitioner's liability for unjust enrichment tax under Title III and its claim for refund under Title VII of said act.

The proceeding was submitted upon a stipulation of facts, oral testimony, exhibits, and a supplemental stipulation of facts. All facts contained in the stipulations are found to

be as stipulated, whether specifically set out in our findings or not. From the whole record we make the following findings of fact.

Finding of Fact

Petitioner is a corporation organized and existing under the laws of the State of Kansas, with its principal place of business at Abilene, Kansas. It filed a corporation income [fol. 35] and excess profits tax return for the year 1935 in which it reported its net income on the accrual basis.

At all times material hereto petitioner was engaged in the manufacture and sale of wheat flour. It was a first domestic processor of wheat and, as such, was subject to the processing tax levied under the Agricultural Adjustment Act at the rate of 30 cents per bushel of clean dry wheat processed between July 9, 1933, and January 6, 1936.

During the period from January 1, 1935, to May 1, 1935, petitioner paid to the collector of internal revenue certain processing taxes (not in issue herein) and claimed and was allowed the amount so paid as a deduction from gross income in its Federal income tax return for the year 1935.

On June 29, 1935, petitioner caused to be instituted, in the District Court of the United States for the District of Kansas, a suit seeking to enjoin the further collection from it of processing taxes levied under the authority and provisions of the Agricultural Adjustment Act. The court granted a temporary injunction on July 24, 1935, effective from May 1, 1935, enjoining the further collection from the petitioner of processing tax on condition that it file information returns with the collector and deposit in a bank, designated as the depository of the court, a sum of money equal to the tax shown to be due by such returns, pending the final determination of the constitutionality of the act imposing the tax. Pursuant to such order and during the period May 1 to December 31, 1935, petitioner paid into the designated bank the total sum of $93,974.40 and, for the final month of said period, accrued upon its books as a liability for the processing tax, but did not pay to the collector or to the depository of said court, the sum of $9,896.66, plus an additional item of $1,183.64 representing a reserve for possible increases in the processing tax for prior years.

On February 28, 1936, following the invalidation of the Processing Tax Act by the Supreme Court on January 6,

1936 (United States v. Butler, 297 U. S. 1), the District Court of the United States for the District of Kansas entered an order making permanent the temporary injunction theretofore granted and directed the depository bank to pay over to petitioner the sum of $93,974.40 theretofore de- [fol. 36] posited by it pursuant to the court's earlier order. This order was complied with and the said sum, on February 28, 1936, was paid to petitioner.

After the invalidation of the Processing Tax Act by the Supreme Court certain of petitioner's vendees filed intervention petitions in the injunction proceeding, seeking to have the impounded moneys returned to them. These petitions were resisted by petitioner upon technical grounds. The intervening petitions were denied on February 28, 1936.

During the calendar year 1936 petitioner, in its books of account, credited the processing tax returned to it pursuant to the order of the District Court to an account designated "Reserve for Processing Tax, Claims, etc." A summary and detailed analysis of this account is attached to one of the stipulations as an exhibit. Briefly, it shows total credits of $105,254.70 and debits of an equal amount, the last debit reflecting a transfer to surplus on June 30, 1939, of $30,-289.99. Other debits were made to the account between January 1, 1936, and June 30, 1939, for legal fees, accounting fees, court costs, payment of Title III tax and reimbursements to vendees on shipments of flour made during the injunctive period. A summary of the last mentioned item shows $2,475.03 paid in 1936, $41,879.50 paid in 1937, and $1,511.37 paid in 1938.

After the injunction had been made permanent and the money which had been impounded had been released to petitioner, certain of its vendees instituted suit against it, claiming to be entitled to $1.38 per barrel of flour purchased by them during the injunctive period. The action was founded upon the Miller's Federation Uniform Sales Contract and upon quasi contractual and equitable trust fund theories. The suits were resisted and ultimately dismissed.

Petitioner's sales of flour from May 1 to December 31, 1935, were made at a stated price per barrel. The selling price consisted of the usual items of cost, plus normal profit, and included in addition an amount sufficient to cover the processing tax. The invoice reflected the contract price, but did not show the tax as a separate item. The contract price was included in the gross sales entered on petitioner's

books. More than 50 percent of such sales were made under the Miller's Federation Uniform Sales Contract re- [fol. 37] ferred to above. The pertinent reference to processing taxes in the contract is as follows:

The price named in this contract includes all taxes as at the date hereof proclaimed by the Secretary of Agriculture by virtue of the authority vested in him by the Agricultural Adjustment Act. * * * Under said Act it is provided that said taxes may be changed from time to time. It is recognized * * * that there is a growing tendency on the part of the United States and the separate states to tax grain * * * used in connection with the manufacturing, processing, blending, sale or distribution thereof. It is therefore, agreed * * * that if, after the date of this contract, the commodities * * * used in connection with the manufacturing, processing, blending, sale or distribution thereof, shall become subject to any increase in taxes or to any new or additional tax or taxes other than those included in the price hereof, (if the seller shall be required by law to collect such increases or additional taxes) * * * said increases or additional taxes shall be added to the price hereof; and correspondingly if any tax included in the price hereof shall be decreased or abated, then in that event, said decrease or abatement shall be deducted from the price hereof.

Petitioner had been advised by counsel as early as July, 1935, that the Government intended, if the act should be held invalid, to recapture by new legislation a large part of the unpaid processing taxes, and that it would be inadvisable to make any commitments to refund any definite amount or any percentage of the tax to its customers, since by agreeing to do so it might seriously impair its financial condition. On June 22, 1936, Congress enacted the Revenue Act of 1936, providing in Title III for the imposition of the unjust enrichment tax and in Title VII for the refund of taxes paid under the Agricultural Adjustment Act. Petioner's counsel sought a ruling by the Treasury Department on the question whether the Miller's Federation Contract was an agreement, within the meaning of Title III, entitling petitioner to credit against its taxes under that title for any refunds made to vendees under Title VII. In the meantime counsel continued to advise petitioner not to make any definite commitments to its customers with reference to refund of the processing tax to them.

[fol. 38] The petitioner, pursuant to the advice of its counsel, refrained from making any definite promises respecting refunds in all written communications to its vendees. After the suit for injunction had been filed, and up to the latter part of 1936, petitioner, through its officers, salesmen, and brokers, orally informed some of its vendees that it proposed to make an agreement with them as soon as all matters with respect to the impounded fund and unpaid taxes should be finally settled. It was stated that petitioner would treat them fairly and do as well by them as other mills similarly situated, but that no promise could be made to refund any definite amount to them. Petitioner considered the tax clause of the Miller's Federation Contract to be applicable only to increases or decreases in the price between the date of the order and the date of shipment and not as creating any obligation to refund part of the price in case of invalidation of the act. The above promises of fair treatment were made independently of that clause. They were made without approval of counsel, who intimated that they might be construed as creating a legal obligation.

In November 1936 petitioner informed some of its vendees, who had purchased flour under the Federation Contracts, that it intended to seek a final determination of its tax liability by the Treasury Department, and, after the amount of unpaid processing taxes passed on to vendees on which it would be subject to tax had been fixed, that it would seek permission to refund the whole of such amount to vendees, provided the Department would accept such repayment as an offset against "Windfall," income, and excess profits tax liabilities and provided the vendees would accept such amount in satisfaction of their claims. The petitioner was informed by its counsel later in 1936 that the Treasury Department had agreed to allow credit for reimbursements and that it should proceed to make settlements with its vendees. Petitioner thereupon commenced negotiations with some of its vendees and made agreements with some of them as to the amount to be repaid to them.

During 1936, 1937 and 1938 drafts in various amounts were issued by petitioner to the vendees with whom agreements were made, aggregating (together with credits against the accounts of some of them) $45,865,90 ($2,475.03 [fol. 39] in 1936, $41,879.50 in 1937, and $1,511.37 in 1938). Attached to each draft and made a part of it was a "Release Agreement," which, after referring to the difficulty of de-

termining the exact amount of the processing tax which had been borne by the vendor and the vendee, recited that "the amount of the taxes shifted to vendee * * * was not more, and may be less than" the total of the draft and credit memorandum referred to in the agreement. By cashing the draft the vendee acknowledged full payment and satisfaction of, and discharged the vendor from, all demands, charges, claims, actions, and rights of action growing out of amounts paid an account of processing tax during the injunctive period and included in or added to the price of flour sold by the vendor to him; covenanted that he was the actual purchaser of the flour and the owner of the claim, that he was not a party to any pending action against the vendor, and that he had not authorized the institution or prosecution of any suit or action against it. The agreement also stated that nothing therein was to be construed as, or constitute an admission of, liability of the vendor to any other person, firm, or corporation and that all legal and equitable defenses, of which it might be possessed, in any and all pending and future litigation against it, were expressly reserved.

Petitioner did not make refunds to all who had purchased flour from it during the injunctive period. Refunds were made to some customers who had purchased under Miller's Federation Contracts, irrespective of whether or not they had been promised fair treatment. In making refunds only regular customers were considered, and a large number of casual customers, or customers toward whom the petitioner felt no obligation, were ignored. The petitioner made no attempt to effect settlements with those to whom the promises to treat fairly had been made but who had not purchased under the Miller's Federation Contracts.

On a schedule attached to petitioner's income tax return for the year 1935 petitioner deducted from the amount of $908,613.29 shown as "Gross Sales, per Books," the amount of $106,604.02 as "Provision for allowances to Vendees of Processing Taxes." It added the amounts of the impounded funds returned to it in 1936 and accrued processing taxes which had not been paid, namely, $103,887.54, reporting the [fol. 40] resulting figure of $905,896.81 as "Net Sales." The amount of $908,613.29 represents the amount arrived at after deducting from total gross sales amounts aggregating $163,526.21 representing estimated processing taxes collected from vendees during the year. Petitioner's total

gross sales for 1935 were the aggregate of the two last mentioned amounts or $1,072,139.50. The sum of $163,526.21 deducted from petitioner's gross sales in its books of account included, among other items, the $93,974.40 impounded in the depository and the $9,896.66 accrued upon petitioner's books as processing taxes for the month of December 1935 but not impounded or paid over to the Treasury Department.

In determining the deficiency the respondent disallowed as a deduction $105,054.70, consisting of the following items:

Processing taxes impounded and later (Feb. 1936) released to petitioner	$ 93,974.40
Accrued processing taxes Dec. 1935. Not impounded or paid over to treasury	9,896.66
Estimated processing reserve set up to provide for additional assessments for prior years	1,183.64
	105,054.70

The petition assigns error in disallowance of $101,783.89 of the above amount as a deduction.

The income tax returns of petitioner for 1936 and 1938 are not in evidence, and the record does not show whether the payments to customers of $2,475.03 and $1,511.37 in those years were claimed as deductions, or whether they were allowed or disallowed by the respondent. Petitioner's income tax return for 1937 shows a net loss of $66,944.25, computed by including in the deductions claimed the sum of $43,390.87 representing payments to customers in that year in settlement of processing tax claims.

Pursuant to the provisions of Title VII of the Revenue Act of 1936, petitioner filed a claim for the refund of processing taxes paid for the period July 9, 1933, to May 1, 1935. This claim was considered by respondent in connection with a settlement of petitioner's tax liability under section 506 of the Revenue Act of 1936. Petitioner and respondent, under date of April 8, 1939, executed a closing agreement [fol. 41] under section 506, supra, wherein they agreed: * * * that the total liability of the taxpayer for tax, penalty and interest under the provisions of Title III of the Revenue Act of 1936 [for taxable years ended prior to January 1, 1938], and the total amount with interest thereon, allowable to the taxpayer as a refund of amounts paid as tax under the Agricultural Adjustment Act, as amended, shall

be finally settled * * * by the payment of * * * $16,405.33 by the taxpayer.

The computation made in connection with the closing agreement discloses a net unjust enrichment tax liability under Title III for 1935, 1936, and 1937, of $36,880.21, a refund under Title VII of $20,474.88, and a net tax payable of $16,405.33. Notice and demand for payment in accordance with the agreement was mailed to the petitioner on April 27, 1939, and the liability of $16,405.33 was paid on May 2, 1939. The sum of $2,649.25 represented processing taxes paid by the petitioner during 1935 and was a part of the deduction claimed for such taxes in its income tax return for that year and allowed in determining the deficiency.

Opinion

Mellott: The findings are more comprehensive than would seem to be required under the issues as stated by us in the beginning. The pleadings, stipulations, evidence, and opening brief of petitioner indicate that we are being called upon to decide whether petitioner properly excluded $106,604.02 from its gross receipts in 1935. The first section of its opening brief concludes: "It is submitted that $106,604.02 of petitioner's 1935 'gross receipts' did not constitute income until the controversies relating thereto were determined in 1937." Petitioner's argument may be summarized as follows:

At the end of the taxable year 1935 it had accrued upon its books $105,054.70 as processing taxes. When the act was declared invalid (January 6, 1936) this amount was restored to income. It says: Since, instanter such unconstitutionality was declared, there accrued or vested a substantial possibility that $1.38 per barrel of flour sold (not "processed") during the injunctive period would have to be disbursed either to customers or to the Government, the [fol. 42] amount of $106,604.02—the estimated amount which it might be required to repay—was set up on its books, held "in abeyance" or in a "suspense account", and excluded from gross income in its return for 1935. Then, says petitioner, in 1937 the controversies as to these moneys were substantially resolved, whereupon it made reimbursements to its customers totaling $45,865.90 with respect to its 1935 sales. It "then recognized as income, for the first time, all of its 1935 gross receipts except the $45,865.90

thereof which it had refunded to customers. It * * * is not now asking that its income be computed upon the basis of actual income less * * * [the $105,054.70]. * * * It asks to be permitted to deduct only such reimbursements as it actually made to its vendees." (The quotations are from petitioner's reply brief.)

Before passing to what seems to be the real issue to be decided on this phase of the proceeding—i. e., the deductibility of $45,865.90 from petitioner's 1935 gross income—it may be stated that petitioner relies upon Commissioner v. Brown, 54 Fed. (2d) 563; certiorari denied, 286 U. S. 556, as authorizing it to set aside the entire $106,604.02 in a "suspense account" and in refusing to include it in gross income because "a taxpayer is not required to report as income that which he may never be permitted to retain. * * *." It points out that the moneys received by it upon the consummation of the injunction suit were "hot moneys"; that it was reasonably certain petitioner would be unable to retain them; that it was legally obligated to repay an equitable portion to its vendees; that it never asserted any claim of absolute ownership to the fund, but treated it as a "suspense account"; and that under the accrual method of accounting such moneys did not become income until all controversy as to their ownership was settled.

The contentions set forth above are not, in our opinion, well founded. No controversy as to the ownership of the proceeds from the sale of petitioner's flour existed. It had increased the selling price of its flour to include the processing tax and the increased price had been paid by its customers with full knowledge of the facts. It had not legally obligated itself to repay any portion of the sale price to its vendees, nor was there any equitable obliga-
[fol. 43] tion upon it to do so. As pointed out in Moundridge Milling Co. v. Cream of Wheat Corporation, 105 Fed. (2d) 366, the sales contracts fixed a "composite price" and did not designate the product sold and the tax separately or provide for the refund of any portions of the payments made on past deliveries. Cf. Johnson v. Igleheart Brothers, Inc., 95 Fed. (2d) 4; certiorari denied, 304 U. S. 585. If petitioner were able to save on any of the items going to make up the total cost of the flour which it sold, it thereby increased its profits pro tanto. In our opinion the total

amount received by petitioner from the sale of its flour constituted gross income to it. North American Oil Consolidated v. Burnet, 286 U. S. 417.

Petitioner next contends that it agreed to settle or compromise its vendees' claims for reimbursement in the year of shipment and that therefore, under a ruling of the Department,[1] it is entitled to treat the reimbursements as deductions from gross income for that year. The substance of the ruling is that processors, keeping their accounts and filing their returns on the accrual basis, may deduct from gross income "for the year in which they agreed with the vendees to settle or compromise the disputed claims", the amounts so agreed upon. Petitioner argues that it "acknowledged its liability in 1935 and has maintained a consistent position throughout." It relies chiefly upon the statements made by its officers to its customers to the effect that they would be treated fairly and as liberally as customers of other mills were treated, which, it says, constituted an agreement ultimately carried out. We do not agree with this contention. The so-called "treat fairly" agreements were no more than assurances given by petitioner to its customers to retain their good will. The testimony of petitioner's officers indicates that they did not intend to bind petitioner to make any repayments to its vendees. Petitioner's counsel and auditor had advised that "it was unsafe to make any definite promises as to amounts that might be paid to the flour buyer." The officers recognized—indeed deliberately chose to bind petitioner no further—that whether any amounts were ever paid to its vendees "would depend upon some other agree- [fol. 44] ment later made." The later agreements, rather than the "treat fairly" promises, were, in our opinion, the bases upon which the payments aggregating $45,865.90 were made.

Having held, as we do that the $45,865.90 must be included in computing petitioner's gross income for the year 1935 and having also held that the payments to its vendees, aggregating that amount, were not made pursuant to a specific obligation incurred during the year 1935, we pass to petitioner's contention that the respondent erred "in failing to give due and proper effect to the requirements of

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[1] G. C. M. 20134, C. B. 1938—1, p. 122

section 41, 42 and 43 of the Revenue Act of 1934 which require the Commissioner to consider credits and deductions for the taxable year in which 'paid or accrued' or 'paid and incurred', dependent upon the method of accounting upon the basis of which the net income is computed and in so disregarding the mandatory provisions of said sections 41, 42 and 43 as to distort and improperly reflect petitioner's income for said period * * *."[2]

The sections relied upon are shown in the margin.[3]

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[2] Paragraph 4 B, amended and supplemental petition

[3] Sec. 41. General Rule.

The net income shall be computed upon the basis of the taxpayer's annual accounting period (fiscal year or calendar year, as the case may be) in accordance with the method of accounting regularly employed in keeping the books of such taxpayer; but if no such method of accounting has been so employed, or if the method employed does not clearly reflect the income, the computation shall be made in accordance with such method as in the opinion of the Commissioner does clearly reflect the income: If the taxpayer's annual accounting period is other than a fiscal year as defined in section 48 or if the taxpayer has no annual accounting period or does not keep books, the net income shall be computed on the basis of the calendar year. (For use of inventories, see section 22 (c).)

Sec. 42. Period in Which Items of Gross Income Included.

The amount of all items of gross income shall be included in the gross income for the taxable year in which received by the taxpayer, unless, under methods of accounting permitted under section 41, any such amounts are to be properly accounted for as of a different period. In the case of the death of a taxpayer there shall be included in computing net income for the taxable period in which falls the date of his death, amounts accrued up to the date of his death if not otherwise properly includible in respect of such period or a prior period.

Sec. 43. Period for Which Deductions and Credits Taken.

The deductions and credits provided for in this title shall be taken for the taxable year in which "paid or accrued" or "paid or incurred," dependent upon the method of accounting upon the basis of which the net income is computed,

[fol. 45] The identical question was before us in Cannon Valley Milling Co., 44 B. T. A. 763, (on appeal C. C. A. 8th Cir.). The petitioner in that case, though under no enforceable obligation in 1935 to pay over to its vendees any of the amount refunded to it in 1936, nevertheless in 1937 paid over a substantial portion of it to them in order to avoid threatened litigation, to keep their good will, and to compromise their claims. We pointed out that the amounts so paid were ordinary and necessary expenses of carrying on a trade or business, citing Superheater Co., 12 B. T. A. 5; affd., 38 Fed. (2d) 69; O'Day Investment Co., B. T. A. 1230; H. M. Howard, 22 B. T. A. 375; International Shoe Co., 38 B. T. A. 81, 95; Helvering v. Hampton, 79 Fed. (2d) 358; and Welch v. Helvering, 290 U. S. 111, and that they were so considered by the Treasury Department;[4] held that section 43 was not meaningless and should be applied in proper cases; expressed the opinion that the Department could not, by regulation, limit the scope of the section; and concluded that the payments made to the vendees should be allowed as a deduction in computing the taxpayer's income for 1935, since they related to the sales made in that year and did not relate to the sales made in the later period. There is no substantial difference between the facts in the instant proceeding and those in the cited case. The $45,865.90 paid by this petitioner to its vendees represented payments under claims relating to sales made in 1935. If such sales had not been made there would have been no basis for the claims and no reimbursements would have been made. On the authority of the cited case and for the reasons stated therein, we hold that the $45,865.90 in issue here should be allowed as a deduction in computing petitioner's income tax for the year 1935.

The remaining issue arises in connection with respondent's claim that $2,649.25 should be added to petitioner's

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unless in order to clearly reflect the income the deductions or credits should be taken as of a different period. In the case of the death of a taxpayer there shall be allowed as deductions and credits for the taxable period in which falls the date of his death, amounts accrued up to the date of his death if not otherwise properly allowable in respect of such period or a prior period.

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[4] G. C. M. 20134. C. B. 1938—1, p. 122.

gross income for the year 1935. His contention is that [fol. 46] petitioner, in 1939, was allowed a refund of processing taxes in the total principal amount of $15,928.85, of which $2,649.25 pertained to the taxable year 1935. The stipulated facts have been shown in our findings. They are not entirely clear unless reference is made to some of the figures shown in detail in the exhibits.

During the period the processing tax was being collected (1933 to 1935, inclusive) petitioner deducted from its gross income processing taxes aggregating $318,783.78; $89,151.77 was deducted in 1933, $176,761.05 in 1934, and $52,870.96 in 1935. In the computation attached to the closing agreement the Title VII refund was determined to be $15,928.82 and interest was added in the amount of $4,546.06, making a total of $20,474.88. Petitioner's tax liability under Title III, tax on unjust enrichment, was determined to be $36,880.21. The difference between the latter amount and $20,474.88 or $16,405.33 was paid by petitioner in conformity with the closing agreement. The portion of the "refund" allocable to 1935 was determined by taking 5287096/31878738 of $15,928.82.

Petitioner contends that the closing agreement was a compromise settlement of its Title III and Title VII controversies upon an aggregate, net basis and that no item in the accompanying schedule can be segregated and held to be a "refund" for the year 1935. It argues that the schedules became submerged into and were superseded by the written agreement; that it is the only competent evidence of the transaction; that it shows merely a payment of an additional amount of tax ($16,405.33) by petitioner; that no amount was ever "refunded" to it; and that even if a "refund" were actually made, it can not be allocated to the various years. We do not believe that any of these contentions are sound. All of the documents should be considered together. Collectively they show that petitioner was allowed a refund of $20,474.88, which, together with payment of $16,405.33, settled its tax on unjust enrichment under Title III. We think, therefore, that the only question to be considered is whether the refund in 1939 of the amount paid in 1935 as an unconstitutional tax should be determined to be income in the year of receipt, or restored to income for the year in which the deduction was taken.

[fol. 47] The question was recently discussed at length by this Board in E. B. Elliott Co., 45 B. T. A. 82, the majority

holding "that all refunds of paid taxes are to be adjusted to the years in which the taxes were paid and deductions claimed, as the best method to reflect income; the only proper departure from the rule of adjustment of the refund in the years of payment is where the statute of limitations or some other consideration has made it impossible. In such cases it is obviously inequitable to allow the taxpayer the unjust enrichment which would result and the refund must then be treated as income in the year of receipt." This is determinative of the present controversy. It may be added that, in view of the conclusion reached upon the first issue, it would be highly inequitable to the fiscus to deny the claimed adjustment. On the authority of the cited case this issue is resolved in favor of the respondent.

Reviewed by the Board.

Decision will be entered under Rule 50.

Smith, Kern, and Opper concur in the result on the authority of E. B. Elliott Co., 45 B. T. A. 82, as to both points.

Sternhagen, Van Fossan, Murdock, and Tyson dissent.

Dissenting Opinion

Arnold, dissenting: It seems to me that the majority stresses the exception contained in section 43 and ignores the general rule thereof regarding the taking of deductions. The general rule stated in that section, and repeatedly emphasized by the courts and this Board, is that "deductions * * * shall be taken for the taxable year in which 'paid or accrued' or 'paid or incurred,' dependent upon the method of accounting upon the basis of which the net income is computed * * *." Under the general rule the entire amount received from flour sales constituted gross income; with this the majority agrees. Under the general rule no deductions could have been taken in 1935 for liabilities that were not incurred, accrued, or paid until later years; with this the majority agrees. It is my opinion that when the majority reaches this point the issue has been decided and there is no justification for carrying back from 1936, [fol. 48] 1937, and 1938 deductions accrued in those years and not paid or accruable in 1935. Petitioner's 1935 income

will be clearly reflected by taking into account all items of income and deductions of that annual accounting period.

The majority opinion states that the identical question was before us in Cannon Valley Milling Co., 44 B. T. A. 763 (on appeal C. A. A., 8th Cir.), and on the authority of the cited case and for the reasons stated therein holds that the payments to vendees in 1936, 1937, and 1938 are deductible from 1935 income, although not accruable in that year. The cited case holds that amounts so paid were ordinary and necessary expenses of carrying on a trade or business; that section 43 was not meaningless and should be applied in proper cases; and that respondent could not by regulation limit the scope of section 43. That opinion further points out that few instances have arisen in which the courts or this Board have had occasion to consider section 43 and that the cases relied on by the parties litigant furnished but slight aid in determining the issue. It is important therefore to consider the intent of Congress in its enactment of the exception to the general rule contained in section 43.

The exception, as originally enacted by Congress, first appeared in the Revenue Act of 1921, which provided that losses should be deducted in the year "sustained unless, in order to clearly reflect the income, the loss should, in the opinion of the Commissioner, be accounted for as of a different period." Sec. 234 (a) (4).

In the Revenue Act of 1924 Congress extended the exception to all deductions and credits. The exception appears in section 200 (d) of that act in identically the same language as it appears in section 43 of the Revenue Act of 1934. All intervening revenue acts and those enacted subsequent to the taxable year contain the exception in the same language.

In explaining the change made in the exception by the Revenue Act of 1924, the Committee on Ways and Means said: "The Revenue Act of 1921 * * * authorizes the Commissioner to allow the deduction of losses in a year other than that in which sustained when, in his opinion, it is necessary to clearly reflect the income. The proposed [fol. 49] bill extends that theory to all deductions and credits. The necessity for such a provision arises in cases in which a taxpayer pays in one year interest or rental payments or other items for a period of years. If he is forced to deduct the amount in the year in which paid, it may result in a distortion of his income which will cause

him to pay either more or less taxes than he properly should." (H. R. 179, 68th Cong., 1st sess., pp. 10, 11.) The report of the Senate Committee on Finance is to the same effect and in identical language (S. Rept. No. 398, 68th Cong., 1st sess., p. 10.)

According to the reports of the Ways and Means Committee and the Senate Finance Committee Congress intended, by the exception, to make provision for cases in which "a taxpayer pays in one year interest or rental payments or other items for a period of years." The payments made by this petitioner to its vendees were not interest payments in one year for a period of years; the payments were not rental payments made in one year for a period of years; nor were they payments in one year of other items for a period of years. As a matter of fact petitioner paid back in one year (1936, 1937, or 1938) a portion of the price of flour sold in 1935. No payments in one year for a period of years are involved in this proceeding and such payments as were made were not because of any obligation growing out of the sale itself, but primarily for the purpose of retaining the good will and the business of certain selected customers. Since the exception was designed by Congress to prevent the distortion of income which would result from deducting in one year the accumulated deductions of a period of years, I can see no reason to apply the exception to an entirely different situation, and under circumstances which violate one of the cardinal rules of income tax law, namely, that tax liability shall be determined on the basis of annual accounting periods.

Furthermore, it seems to me that the Commissioner's regulations for administering the exception are entitled to more weight and consideration than the majority has given thereto. By section 212 of the Revenue Act of 1924 and section 41 of the Revenue Acts of 1934 and 1936 Congress delegated to the Commissioner the power to deter- [fol. 50] mine whether the method of accounting employed by a taxpayer clearly reflects its income, and "if the method employed does not clearly reflect the income" the statutes provide that "the computation shall be made in accordance with such method as in the opinion of the Commissioner does clearly reflect the income." Since a clear reflection of income requires a determination of the period in which

deductions and credits shall be taken, like discretion would seem by implication to be contained in section 43. 3 Paul & Mertens Law of Federal Income Taxation, p. 307.

Respondent's regulations have consistently construed section 43 and its prototypes, as a grant of discretion, in the exercise of which he would allow a deduction as of a different period only in exceptional circumstances. Art. 146, Regulations 62; art. 43-1, Regulations 86 and 94; T. D. 3261, I-1 C. B. 148. The regulations have always required a taxpayer to take the deduction in the year "paid or accrued" or "paid or incurred" and to submit with the return a complete statement of facts upon which it relies to take deductions as of a different taxable year. The Commissioner would then determine from such facts whether the taxpayer was entitled to the deduction for the period requested. The requirement in the regulation is in my opinion a reasonable one and imposes no hardship upon a taxpayer. The successive reenactment of the statutory provisions without alteration have imparted to the regulations the force and effect of law, Helvering v. Reynolds Tobacco Co., 306 U. S. 110, and unless petitioner has complied with the distinct method provided for in the regulations, it can not avail itself of the exception contained in section 43. Stokes v. United States, 19 Fed. Supp. 577, 580.

Assuming that the exception is applicable to the facts here, the record does not show that this petitioner made any effort to comply with the distinct method provided in the regulations for availing itself of the exception. In my opinion, the petitioner should have so complied if it expected the benefit of the statute. Even if petitioner had complied with the regulations, it is my opinion that the facts and circumstances here are not such as Congress had in mind when it created the exception to the general rule.

For the foregoing reasons I respectfully dissent from the opinion of the majority.

[fol. 51] BEFORE UNITED STATES BOARD OF TAX APPEALS

DECISION—December 29, 1941

Pursuant to the findings of fact and opinion of the Board promulgated November 12, 1941, the parties herein on December 24, 1941 having filed an agreed recomputation of tax, now, therefore, it is

Ordered and Decided: That there are deficiencies in excess-profits tax in the amount of $927.97 and income tax in the amount of $8,760.19 for the calendar year 1935.

Entered December 29, 1941.

Arthur J. Mellott, Member. (Seal.)

IN UNITED STATES CIRCUIT COURT OF APPEALS, TENTH CIRCUIT

PETITION FOR REVIEW, CASE NO. 2556—Filed March 26, 1942

Guy T. Helvering, United States Commissioner of Internal Revenue, holding office by virtue of the laws of the United States, hereby petitions the United States Circuit Court of Appeals for the Tenth Circuit to review the decision entered by the United States Board of Tax Appeals on December 29, 1941, ordering and deciding that there are deficiencies in Federal income and excess-profits taxes for the taxable year 1935 in the respective amounts of $8,760.19 and $927.97. This petition for review is filed pursuant to the provisions of Section 1141 and 1142 of the Internal Revenue Code.

The Security Flour Mills Company, a corporation organized and existing under and by virtue of the laws of the State of Kansas and having its principal office and place of business in Abilene, Kansas, respondent on review, filed its Federal income and excess-profits tax return for the calendar year 1935 with the Collector of Internal Revenue for the District of Kansas, whose office is located at Wichita, Kansas, and within the jurisdiction of the United States Circuit Court of Appeals for the Tenth Circuit.

J. P. Wenchel, RLW, Chief Counsel, Bureau of Internal Revenue.

[File endorsement omitted.]

[fol. 52] IN UNITED STATES CIRCUIT COURT OF APPEALS

NOTICE OF FILING PETITION FOR REVIEW—Filed April 2, 1942

To: The Security Flour Mills Company, Abilene, Kansas.

You are hereby notified that the Commissioner of Internal Revenue did, on the 26th day of March, 1942, file with

the Clerk of the United States Board of Tax Appeals, at Washington, D. C., a petition for review by the United States Circuit Court of Appeals for the Tenth Circuit of the decision of the Board heretofore rendered in the above-entitled cause. A copy of the petition for review is hereto attached and served upon you.

Dated this 26th day of March, 1942.

J. P. Wenchel, RLW, Chief Counsel, Bureau of Internal Revenue.

Personal service of the above and foregoing notice, together with a copy of the petition for review, is hereby acknowledged this 28 day of March, 1942.

The Security Flour Mills Company, by W. A. Chain, Secretary, Respondent on Review.

[File endorsement omitted.]

IN UNITED STATES CIRCUIT COURT OF APPEALS

NOTICE OF FILING PETITION FOR REVIEW—Filed April 13, 1942

To: Robert C. Foulston, Esq., 608 Fourth National Bank Bldg., Wichita, Kansas.

You are hereby notified that the Commissioner of Internal Revenue did, on the 26th day of March, 1942, filed with the Clerk of the United States Board of Tax Appeals, at Washington, D. C., a petition for review by the United States Circuit Court of Appeals for the Tenth Circuit of the decision of the Board heretofore rendered in the above-[fol. 53] entitled cause. A copy of the petition for review is hereto attached and served upon you.

Dated this 26th day of March, 1942.

B. D. Gamble, Clerk, United States Board of Tax Appeals.

Service of the above and foregoing notice, together with a copy of the petition for review, is hereby acknowledged this 8th day of April, 1942.

Robert C. Foulston, Counsel for Respondent on Review.

[File endorsement omitted.]

IN UNITED STATES CIRCUIT COURT OF APPEALS

STATEMENT OF POINTS, CASE NO. 2556—Filed April 17, 1942

Comes now the petitioner on review herein and makes this concise Statement of Points on which he intends to rely on the review herein, to-wit:

The United States Board of Tax Appeals erred—

1. In ordering and deciding that there are deficiencies in income and excess profits taxes for the year 1935 in the respective amounts of only $8,760.19 and $927.97.

2. In failing and refusing to sustain that portion of the deficiencies claimed by the Commissioner which is attributable to the disallowance by him of the claimed deduction in 1935 of $45,865.90 for amounts repaid by the taxpayer to its vendees in 1936, 1937 and 1938.

3. In holding and deciding that the payments made by the taxpayer to its vendees in 1936, 1937 and 1938 in the aggregate amount of $45,865.90 in connection with the sale by the taxpayer to its vendees of wheat products processed and sold in 1935 were deductible from its gross income for the year 1935 in computing its net taxable income for 1935, under the provisions of Section 43 of the Revenue Act of 1934.

4. In failing and refusing to hold and decide that under Article 43-1 of Regulations 86 the taxpayer is not entitled [fol. 54] to the deductions claimed in the taxable year 1935 in the aggregate amount of $45,865.90 since the Commissioner has determined that the special treatment set forth under such article is not applicable in the instant proceeding where the claimed amounts were paid in subsequent years and no liability for such payments was admitted or conceded by the taxpayer during the year 1935.

5. In failing to hold and decide that since no obligation, express or implied, existed during the year 1935 to make reimbursement of any part of the taxpayer's gross sales for its taxable year 1935, the taxpayer is not entitled to deduct from its gross income for 1935 the reimbursements made by it to its vendees in later years.

6. In that its opinion and decision are contrary to its findings of fact.

7. In that its opinion and decision are not supported by its findings of fact and are contrary to law.

J. P. Wenchel, Chief Counsel, Bureau of Internal Revenue.

Statement of Service

A copy of this Statement of Points was mailed to Robert C. Foulston, Esq., 608 Fourth National Bank Building, Wichita, Kansas, attorney for respondent on review, this date, April 17, 1942.

Chas. E. Lowery, Special Attorney, Bureau of Internal Revenue.

[File endorsement omitted.]

Before United States Board of Tax Appeals

Designation of Contents of Record on Review, Case No. 2556—Filed April 17, 1942

To the Clerk of the United States Board of Tax Appeals:

Now Comes Guy T. Helvering, Commissioner of Internal Revenue, the petitioner on review herein, by and through his attorney, J. P. Wenchel, Chief Counsel, Bureau of Internal Revenue, and for the purpose of the review which he, the said petitioner on review, has theretofore [fol. 55] taken to the United States Circuit Court of Appeals for the Tenth Circuit, hereby designates for inclusion in the record on review the following:

1. Docket entries of the proceedings before the Board.
2. Pleadings:
   - (a) Amended and supplemental petition, including annexed copy of deficiency notice.
   - (b) Answer to amended and supplemental petition.
   - (c) Reply to answer to amended and supplemental petition.
3. Findings of fact and opinion promulgated November 12, 1941.
4. Decision.

5. Petition for review.
6. Notices of filing petition for review.
7. Statement of points.
8. This designation.

Wherefore, it is requested that copies of the record as above designated be prepared and transmitted to the United States Circuit Court of Appeals for the Tenth Circuit in accordance with the rules of said Court.

J. P. Wenchel, Chief Counsel, Bureau of Internal Revenue.

Statement of Service

A copy of this designation of contents of record on review was mailed to Robert C. Foulston, Esq., 608 Fourth National Bank Building, Wichita, Kansas, attorney for respondent on review this date, April 17, 1942.

Chas. E. Lowery, Special Attorney, Bureau of Internal Revenue.

[File endorsement omitted.]

[fol. 56] Clerk's Certificate to foregoing transcript omitted in printing.

In United States Circuit Court of Appeals

Petition for Appeal, Case No. 2589—Filed February 11, 1942

Your petitioner, conceiving itself aggrieved by the final decision and judgment of the United States Board of Tax Appeals made and entered on the 12 day of November, 1941, does hereby petition and pray that an appeal be allowed from said decision and judgment to the United States Circuit Court of Appeals for the Tenth Circuit as by law provided.

Your petitioner herein, The Security Flour Mills Company, a corporation organized and existing under and by virtue of the laws of the State of Kansas and having its principal office and place of business in Abilene, Kansas, respectfully shows to the Court and hereby states the fol-

lowing facts in connection with the appeal from said decision of the United States Board of Tax Appeals:

First: This is a proceeding for review by the United States Circuit Court of Appeals for the Tenth Circuit of a decision of the United States Board of Tax Appeals entered November 12, 1941, redetermining a deficiency in federal income taxes of the petitioner for the calendar year 1935 in the amount of Four Hundred Ninety Six and 73/100 Dollars ($496.73).

[fol. 57] Second: The petitioner's federal income tax return for the calendar year 1935 was filed with the Collector of Internal Revenue for the District of Kansas at Wichita, Kansas. On November 28, 1939, a hearing was held at Kansas City, Missouri, before The Honorable William W. Arnold, a member of the United States Board of Tax Appeals. The said United States Board of Tax Appeals promulgated its report and opinion on November 28, 1939. On November 12, 1941, the said United States Board of Tax Appeals entered its decision determining a deficiency in federal income taxes of the petitioner for the calendar year 1935 in the amount of Four Hundred Ninety Six and 73/100 Dollars ($496.73).

Your petitioner herein, The Security Flour Mills Company, a corporation, shows that the United States Circuit Court of Appeals for the Tenth Circuit has territorial jurisdiction of the adjudicated liability and controversy and that this petitioner requests a review of said decision and judgment by the United States Circuit Court of Appeals for the Tenth Circuit.

Third: The controversy between the petitioner and the respondent is the determination of federal income taxes of the petitioner for the calendar year 1935, and involves the following issues:

(1) Did the petitioner receive a refund of processing taxes from the Commissioner of Internal Revenue (as claimed by the respondent and so held by the Board of Tax Appeals) which were paid by the petitioner during the calendar year 1935?

(2) Assuming arguendo that the Commissioner of Internal Revenue refunded the processing taxes to the petitioner, did the petitioner receive such refund during the calendar year 1935?

Fourth: The facts relating to the issues may be briefly summarized as follows:

Following the invalidation of the Agricultural Adjustment Act on January 6, 1936, by the Supreme Court of the United States in the case of Butler v. U. S., 297 U. S. 1, Congress enacted Title III and Title VII of the Revenue [fol. 58] Act of 1936. Thereafter the petitioner filed a claim for refund of a portion of the processing taxes previously paid by it pursuant to the provisions of Title VII of said Act, said claim for refund being in the amount of *Six* One Thousand Seventy Two and 85/100 Dollars ($61,072.85). Petitioner likewise filed an unjust enrichment tax return pursuant to the provisions of Title III of said Act for the period ending December 31, 1935, showing no tax due. A similar return was filed for the period ending December 31, 1936.

On March 18, 1939, petitioner executed a closing agreement under Section 506 of the Revenue Act of 1936, under which agreement petitioner's liability for unjust enrichment taxes (Title III) were finally settled. By the provisions of said agreement petitioner paid Sixteen Thousand Four Hundred Five and 33/100 Dollars ($16,405.33) as unjust enrichment tax. Following the execution of the closing agreement petitioner received a notice and demand for tax in the amount stipulated in the closing agreement. Payment in full was made by petitioner of the taxes demanded, which were specified in the closing agreement.

Subsequent to the execution of the closing agreement the Commissioner reopened petitioner's income tax return for the fiscal year ended December 31, 1935. Following the reopening of the case, the Commissioner issued a deficiency notice of income tax for the year 1935. The basis for the asserted deficiency was claimed to be that the petitioner during the period ended December 31, 1935, had taken a deducation for processing taxes paid and that it had received a refund of such processing taxes under the closing agreement executed March 18, 1939.

Fifth: The errors committed by the Board of Tax Appeals, which are hereby assigned as the basis for this review, are as follows:

(1) The United States Board of Tax Appeals erred in affirming the determination of the Commissioner of Internal

Revenue of a deficiency in the 1935 income tax return of appellant.

(2) The decision and judgment of the United States Board of Tax Appeals is contrary to law and is contrary [fol. 59] to and is not supported by either the undisputed evidence herein or the findings of fact of said United States Board of Tax Appeals.

(3) Under the undisputed facts herein and under the United States Board of Tax Appeals' own findings of fact, the said Board erred in holding that the petitioner received a refund of processing taxes and in including such refund in the income of the petitioner for the fiscal year ended December 31, 1934.

(4) The United States Board of Tax Appeals erred in holding or basically assuming that the burden was upon petitioner affirmatively to establish that petitioner did not receive a refund of processing taxes paid during the year 1934.

(5) The United States Board of Tax Appeals erred in not giving final, controlling, and conclusive weight to the closing agreement (petitioner's Exhibit "1") entered into between petitioner and respondent.

(6) The United States Board of Tax Appeals found that the petitioner's title VII refund was $15,928.82 and interest thereon in the amount of $4,546.06, or a total of $20,474.88, which finding was unsupported by any evidence, and the Board erred in so finding.

(7) The Board erred as a matter of law in finding the processing tax refund was in the total amount of $20,474.88, and that the petitioner's unjust enrichment tax under Title III of the Revenue Act of 1936 was $36,880.21.

(8) The Board's finding that the petitioner's Title III unjust enrichment tax of $36,880.21 was unsupported by any evidence, and the verdict erred in so finding.

(9) The Board in finding that the petitioner received a refund of $20,474.88, including interest, disregarded all the positive and affirmative evidence submitted by petitioner with respect to the payment of its Title III tax.

(10) The Board erred in holding and deciding that an alleged refund of $20,474.88 should be included in the tax-

able income of petitioner for the year ending December 31, 1935.

[fol. 60] (11) The Board erred in holding that there is a deficiency in income tax of $496.73 due from the petitioner for the calender year 1935.

Your petitioner herein, The Security Flour Mills Company, a corporation, shows that the United States Circuit Court of Appeals for the Tenth Circuit has territorial jurisdiction of the adjudicated liability and controversy and that this petitioner requests a review of said decision and judgment by the United States Circuit Court of Appeals for the Tenth Circuit.

Wherefore, the petitioner herein prays that This Honorable Court review the decision of the United States Board of Tax Appeals entered November 12, 1941, and reverse said decision as not being in accordance with law and direct the entry of a decision by the United States Board of Tax Appeals determining that there is no deficiency in federal income taxes of the petitioner for the calendar year 1935, and for such other and further relief as may to this Court appear proper in the premises.

Robert C. Foulston, 608 Fourth National Bank Building, Wichita, Kansas.

[Verification omitted.]

[File endorsement omitted.]

In United States Circuit Court of Appeals

Notice of Filing Petition for Review—Filed Feb. 12, 1942

To: J. P. Wenchel, Chief Counsel, Bureau of Internal Revenue.

You are hereby notified that The Security Flour Mills Company did, on the 11th day of February, 1942, file with the Clerk of the United States Board of Tax Appeals, at Washington, D. C., a petition for review by the United States Circuit Court of Appeals for the Tenth Circuit, of the decision of the Board heretofore rendered in the above

[fol. 61] entitled case. Copy of the petition for review as filed is hereto attached and served upon you.

Dated this 11th day of February, 1942.

B. D. Gamble, Clerk, U. S. Board of Tax Appeals.

Service of copy of Petition for Review acknowledged this 12th day of February, 1942.

J. P. Wenchel, Attorney for Respondent.

[File endorsement omitted.]

BEFORE UNITED STATES BOARD OF TAX APPEALS

DESIGNATION OF CONTENTS OF RECORD ON REVIEW, ~~CASE NO. 2589~~—Filed June 2, 1942

To the Clerk of the United States Board of Tax Appeals:

Now Comes The Security Flour Mills Company, petitioner on review herein, by and through its attorney, Robert C. Foulston, and for the purpose of the review which it, the said petitioner on review, has heretofore taken to the United States Circuit Court of Appeals for the Tenth Circuit, hereby designates for the inclusion in the record on review the following:

1. Docket entries of the proceedings before the Board.
2. Pleading:

(a) Amended and supplemental petition, including annexed copy of deficiency notice,

(b) Answer to amended and supplemental petition,

(c) Reply to answer to amended and supplemental petition.

3. Findings of fact and opinion promulgated November 12, 1941.
4. Decision.
5. Petition for review.
6. Notices of filing petition for review.
7. Statement of points.

[fol. 62] 8. This designation.

Wherefore, it is requested that copies of the record as above designated be prepared and transmitted to the

United States Circuit Court of Appeals for the Tenth Circuit in accordance with the rules of said Court:

Robert C. Foulston, 608 Fourth National Bank Bldg., Wichita, Kansas. Attorney for The Security Flour Mills Company, Petitioner on Review.

In United States Circuit Court of Appeals

Order Enlarging Time in Which to File Transcript of Record, Case No. 2589—Filed May 28, 1942

Now, to-wit, on this, the 25th day of May, 1942, it is this day ordered that for good cause shown the time within which said The Security Flour Mills Company, petitioner on review herein, may docket said case and file a transcript of the record here in this court, be and the same is hereby extended to and including June 10, 1942.

Orie L. Phillips, Judge of the United States Circuit Court of Appeals for the Tenth Circuit.

Now, July 2, 1942, the foregoing is certified from the record as a true copy.

B. D. Gamble, Clerk, U. S. Board of Tax Appeals. (Seal.)

[File endorsement omitted.]

[fol. 63] Clerk's Certificate to foregoing transcript omitted in printing.

[fol. 64] In United States Circuit Court of Appeals, Tenth Circuit

Order of Submission—January 18, 1943

First Day, January Term, Monday, January 18th, A. D. 1943. Before Honorable Orie L. Phillips, Honorable Sam G. Bratton and Honorable Walter A. Huxman, Circuit Judges.

These causes came on to be heard and were argued by counsel, Robert C. Foulston, Esquire, and John F. Eberhardt, Esquire, appearing for The Security Flour Mills Company, Fred Youngman, Esquire, appearing for Commissioner of Internal Revenue.

Thereupon these causes were submitted to the court.

IN UNITED STATES CIRCUIT COURT OF APPEALS

OPINION—March 6, 1943

Fred Youngman (Samuel O. Clark, Jr., Ass't Attorney General, Sewall Key and Benjamin M. Brodsky, Special Ass'ts to the Attorney General, were with him on the brief) for Commissioner of Internal Revenue.

Robert C. Foulston and John F. Eberhardt (George Siefkin was with them on the brief) for The Security Flour Mills Company.

Before Phillips, Bratton and Huxman, Circuit Judges.

BRATTON, Circuit Judge:

This proceeding presents questions relating to income and excess profits taxes. The taxpayer was engaged in the manufacture and sale of flour, and was subject to the processing tax levied under the Agricultural Adjustment Act of 1933, 48 Stat. 31, 7 U.S.C.A. §601 et seq. During the period which is material here more than half of its sales of flour were made under the Miller's Federation Uniform Sales Contract. The sales were at a stated price per barrel which included the usual items of cost, a normal profit, and a sufficient amount to cover the processing tax. The invoices reflected the contract price but did not show the tax [fol. 65] as a separate item. The taxpayer secured a temporary injunction, effective from May 1, 1935, restraining the further collection of the tax, on condition that it file informational returns and deposit in a designated bank a sum equal to the amount of the tax, computed according to the act. Up to December 1, 1935, the taxpayer deposited in the bank sums aggregating $93,974.40; and it accrued on its books as a liability for the processing tax, but did not pay either to the collector or the depository, the sum of $9,896.66, plus the additional item of $1,183.64, representing a reserve

for possible increases in the tax for prior years. In January, 1936, the processing tax provisions in the act were held invalid, United States v. Butler, 297 U. S. 1; and in February, thereafter, the sum deposited in the bank was returned to the taxpayer. Certain vendees of flour sought to intervene in the injunction proceeding and assert rights in the impounded funds, but the taxpayer resisted and the petitions were denied. After the impounded funds had been returned to the taxpayer, certain vendees instituted suits against it to recover amounts equal to the processing tax on flour purchased while the injunction was in force, but the taxpayer defended and the actions were finally dismissed. In 1936, the taxpayer credited the money which the bank returned to it to an account on its books designated "Reserve for Processing Tax, Claims, etc." The account bears credits aggregating $105,254.70, and debits of an equal amount, the last debit being a transfer to surplus of $30,289.99, made in June, 1939. In 1936, 1937, and 1938, the taxpayer disbursed to certain of its vendees on shipments of flour made while the injunction was in effect sums aggregating $45,865.90. No refunds were made to the other purchasers during that period. The taxpayer kept its books and made its tax returns on the accrual basis. In its return for 1935, it made deductions which included the funds impounded in the depository and the funds accrued on its books as processing taxes but not impounded or paid to the collector. The Commissioner disallowed the deductions of these items. The Board of Tax Appeals ruled that the sums which the taxpayer received from its vendees to cover the processing tax constituted gross income for the year 1935, and that the amounts disbursed in 1936, 1937, and 1938, should be carried back and allowed as deductions for the year 1935. The Commissioner sought review from [fol. 66] that part of the decision allowing the deductions in that manner.

Like all other revenue acts enacted since the adoption of the Sixteenth Amendment, the Act of 1934, 48 Stat 680, assessed the taxes on the basis of annual periods, either the calendar year, or, at the election of the taxpayer, a fiscal year; and section 23(a) authorized the deduction from gross income of all ordinary and necessary expenses paid or incurred during the taxable year in carrying on any trade or business.

The production of revenue ascertainable and payable at fixed intervals is the essence of any feasible system of taxation. It is the essence itself of any general scheme for taxing income as a means of producing a regular flow of income. Burnet v. Sanford & Brooks Co., 282 U. S. 359. Where accounts are kept and returns made on the accrual basis, income is to be accounted for in the year in which it is realized, even though not actually received; and deductions are to be taken in the year in which the items deducted are incurred, whether actually paid or not. Brown v. Helvering, 291 U. S. 193. Revenue received under claim of right without restriction in respect of its use or disposition constitutes taxable income, even though the one receiving it may thereafter be adjudged liable to restore it or its equivalent: North American Oil v. Burnet, 286 U. S. 417; Brown v. Helvering, supra; Saunders v. Commissioner, 101 F. (2d) 407; London-Butte Gold Mines Co. v. Commissioner, 116 F. (2d) 478. And ordinarily where the accrual system is used in keeping books of account and making income tax returns, deductions may be claimed for the year the accrual of liability occurred, or not at all, even though the transaction or transactions giving rise to the accrual of liability may have taken place in an earlier year. Lucas v. Ox Fibre Brush Co., 281 U. S. 115. Losses suffered or expenses accrued in a later year may be deducted from earnings in that year. But the tax on the income of a given year may not be withheld or diminished because losses may subsequently occur or expenses be later accrued. Heiner v. Mellon, 304 U. S. 271.

Here the taxpayer received from its vendees amounts equal to the processing tax on flour sold during the period in which the injunction was in force. It made no promise [fol. 67] or contractual obligation to repay or refund any or all thereof in the event the act was declared unconstitutional, or otherwise. It stated to some purchasers of flour that it would treat them fairly, but it carefully and painstakingly avoided making any binding commitment to restore to them any of the fund or its equivalent. It was not legally liable to them for any of it, Moundridge Milling Co. v. Cream of Wheat Corp., 105 F. (2d) 366; and after the declared invalidity of the processing tax statute, it bore no liability to the fiscus for any part of such fund, Rickert Rice Mills v. Fontenot, 297 U. S. 110. But it became entitled to the money and actually received it in 1935 under

claim of right without legal restriction as to its use and disposition, and it therefore constituted taxable income in that year. North American Oil v. Burnet, supra; Brown v. Helvering, supra; Saunders v. Commissioner, supra.

Section 43 of the revenue act, supra, is relied upon as authorizing the relation back of the amounts disbursed to the year 1935. The pertinent part of the section provides that "deductions and credits * * * shall be taken for the taxable year in which 'paid or accrued' or 'paid or incurred', dependent upon the method of accounting upon the basis of which the net income is computed, unless in order to clearly reflect the income the deductions or credits should be taken as of a different period." A substantially identical provision first appeared as section 200(d) of the Revenue Act of 1924, and is to be found in all later revenue acts. In explaining the provision in the Act of 1924, the report of the Committee on Ways and Means of the House stated:

> "The Revenue Act of 1921 * * * authorizes the Commissioner to allow the deduction of losses in a year other than that in which sustained when, in his opinion, it is necessary to clearly reflect the income. The proposed bill extends that theory to all deductions and credits. The necessity for such a provision arises in cases in which a taxpayer pays in one year interest or rental payments or other items for a period of years. If he is forced to deduct the amount in the year in which paid, it may result in a distortion of his income which will cause him to pay either more or less taxes than he properly should."

[fol. 68] The report of the Senate Committee on Finance was identical. These reports make it clear that the legislative intent and purpose of the "unless" provision was to authorize the exception to the general rule in cases in which the taxpayer pays in one year interest, or rental, or other items for a period of years, and to other instances of that character, in order to prevent distortion of income of the taxpayer. It is manifest that Congress had in mind for application of the provision only instances in which a taxpayer receives income or makes expenditures in one year which are attributable to or related to business operations extending over a number of years. The distortion in income sought to be avoided is that which would result from charging a taxpayer with income received in a single year

but in fact earned over a period of years, or permitting him to take in one year deductions actually attributable to operations extending through two or more years. To permit that would not fairly reflect annual income. Instead it would amount to distortion of income. The provision comes into operative play in instances of that kind. It was never intended to go beyond that scope. These transactions were not of that kind. All of the income was fully earned in 1935. No part of it extended over a period of years. The expenditures were not for interest, or rental, or other items of that kind covering a period of years. They were not in liquidation of any previously accrued legal obligation. They were voluntarily made for the primary purpose of retaining the good will of customers; and the liability was accrued and discharged, all after 1935. In short, neither the income nor the respective disbursements were attributable to operations extending over two or more years. Instead each was effected and completed in a single year. For these reasons the taxpayer does not bring itself within the "unless" clause in the statute. The amounts disbursed were deductible from gross income in 1936, 1937, and 1938, respectively; but not from that of 1935. North American Oil v. Burnet, supra.

The taxpayer places strong reliance on Helvering v. Cannon Valley Milling Co., 129 F. (2d) 642. Assuming for the moment that disbursements of this kind may be related back in certain circumstances, though we think otherwise, the two cases are distinguishable. There apparently all the facts were before the court, and it was held that unless [fol. 69] the disbursements were related back income would be distorted with resulting injustice to the taxpayer. Here the return of the taxpayer for 1937 disclosed a net loss, computed by including in the deductions claimed a sum representing the amounts paid in that year to vendees of flour. But the returns for 1936 and 1938 were not introduced in evidence, and there was no showing whatever in respect of gross or net income for those years. Therefore, considering 1935, 1936, 1937, and 1938, together, as they should be considered, there is no basis for the conclusion that the deductions must be related back in order to clearly reflect the income and deductions, and to prevent distortion of income, within the meaning of the statute.

Title III of the Revenue Act of 1936, 49 Stat. 1648, imposes a tax on unjust enrichment arising out of the nonpayment of processing taxes, the burden of which has been shifted to others; and Title VII authorizes refunds for amounts paid as processing taxes. Section 506 of Title III provides that one who is liable for unjust enrichment taxes and who also has a claim for an amount paid as processing taxes may apply to the Commissioner for an adjustment of the two together; that the Commissioner may in his discretion consider them in that manner; that he may enter into a written agreement with the person for the settlement of the case by payment or refund as may be specified in the agreement; and that the agreement shall be a final settlement of the liability for taxes and of the claim for refund, except in cases of fraud, malfeasance, or misrepresentation of material fact. The taxpayer filed a claim for refund of amounts paid as processing taxes before the date on which the injunction became effective. The Commissioner and the taxpayer proceeded under section 506 and reached a settlement of the liability for unjust enrichment taxes and of the claim for refund. The signed agreement provided that the whole matter should be finally settled by the taxpayer making payment of $16,405.33, and that amount was paid. The Board found that the computation made in connection with the agreement disclosed a net unjust enrichment tax liability for 1935, 1936, and 1937 of $36,880.21, a refund of $20,474.88, and a net tax payable of $16,405.33, of which $2,649.25 pertained to a refund of processing taxes for 1935, and was allowed by the Commissioner in determining the deficiency. The Board concluded that such sum [fol. 70] should be restored to income for the year 1935; and the taxpayer perfected a separate appeal from that part of the decision.

The question calls for little discussion. Section 506 is a clear mandate that an agreement entered into under its provisions shall be and constitute a final settlement of the liability for the tax and of the claim for refund, unless there was fraud, malfeasance or misrepresentation of a material fact in connection with its execution. There is no suggestion that any lack of good faith occurred in connection with the execution of this agreement. The contract was a final settlement. And in view of the plain language of the statute, we fail to see any warrant for going behind it and

restoring to income for 1935 any item or sum which was taken into consideration in reaching the settlement.

The order is reversed and the proceeding remanded to the Board.

Dissenting Opinion

Phillips, Circuit Judge, dissenting:

The Security Flour Mills Company will be referred to as the taxpayer. The taxpayer kept its books on an accrual basis.

Sec. 23 of the Revenue Act of 1934 in part provides:

> "In computing net income there shall be allowed as deductions: * * *
>
> "Taxes paid or accrued within the taxable year, * * *"

The question presented is not whether the entire amount received from sales of flour by the taxpayer, including the amount embraced in the composite price to cover processing taxes, was income to the taxpayer in 1935. Manifestly it was. We are concerned rather with a deduction of taxes accrued under an unconstitutional statute, the validity of which was not determined until a subsequent year; and the deduction of amounts returned by the taxpayer to its purchasers.

While it has been held that an unconstitutional statute is void ab initio,[1] the rule is not without certain qualifica-
[fol. 71] tions. In Chicot C. Drainage District v. Baxter State Bank, 308 U. S. 371, 374, the court said:

> "It is quite clear, however, that such broad statements as to the effect of a determination of unconstitutionality must be taken with qualifications. The actual existence of a statute, prior to such a determination, is an operative fact and may have consequences which cannot justly be ignored. The past cannot always be erased by a new judicial declaration. The effect of the subsequent ruling as to invalidity may have to be considered in various aspects,—with respect to particular relations, individual and corpo-

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[1] Norton v. Shelby County, 118 U. S. 425, 442; Chicago, Indianapolis & L. Ry. Co. v. Hackett, 228 U. S. 559, 566.

rate, and particular conduct, private and official. Questions of rights claimed to have become vested, of status, of prior determinations deemed to have finality and acted upon accordingly, of public policy in the light of the nature both of the statute and of its previous application, demand examination."

See, also, Phipps v. School District of Pittsburgh, 3 Cir., 111 F. 2d 393, 395.

The taxpayer here certainly was under compulsion while the validity of the Agricultural Adjustment Act remained undetermined to accrue the tax liability and provide funds for its discharge throughout the entire year of 1935.

I, therefore, conclude that the taxpayer, in its income tax return for 1935, had the right to deduct as taxes accrued in 1935, the $93,974.40 which it accrued on its books for processing tax liability for the period May 1, to November 30, 1935, and paid to the depository, and the $9,896.66 which it accrued on its books, for processing tax liability for December, 1935, but did not pay to the depository. This view is supported by Davies' Estate v. Commissioner, 6 Cir., 126 F. 2d 294, c. d. Oct. 12, 1942, —— U. S. ——, 63 S. Ct. 32, and J. A. Dougherty's Sons, Inc., v. Commissioner, 3 Cir., 121 F. 2d 700.

Therefore, when on January 6, 1936, the Agricultural Adjustment Act was declared unconstitutional in United States v. Butler, 297 U. S. 1, it became the duty of the taxpayer to accrue on its books as income for 1936, the $93,974.40 in the hands of the depository and the $9,896.66 ac- [fol. 72] crued for processing taxes for December, 1935. See Nash v. Commissioner, 7 Cir., 88 F. 2d 477.

It has been held, however, that the Commissioner may cancel a deduction taken in one year for a tax which the taxpayer has accrued or paid, when the tax has been refunded in a later year because it was unlawfully imposed.[2]

However, if what occurred in 1936 is to be related back to 1935, then it would seem that the payments made to cus-

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[2] See Ben Bimberg & Co. v. Helvering, 2 Cir., 126 F. 2d 412, 413;
Inland Products Co. v. Blair, 4 Cir., 31 F. 2d 867;
Leach v. Commissioner, 1 Cir., 50 F. 2d 371;
Bergan v. Commissioner, 2 Cir., 80 F. 2d 89.

tomers by the taxpayer in 1936, 1937, and 1938 should likewise be related back to 1935, under the provisions of Sec. 43 of the Revenue Act of 1934, 48 Stat. 694.[3] Otherwise, the actual income of the taxpayer for 1935 will not be clearly reflected.

I cannot agree that the broad language of the "unless" provision in Section 43 should be narrowly limited to cases where "the taxpayer pays in one year interest or rental or other items for a period of years." The provision is couched in general terms and it contains nothing to indicate that its meaning was to be so limited. Rather, it justifies the interpretation that it is intended to apply to all deductions where its application is necessary to truly reflect the income.

Throughout the calendar year 1935, the taxpayer, from a realistic point of view, was under compulsion to regard the Act as subjecting it to a tax of $1.38 per barrel of flour processed. The selling price consisted of the usual items of cost, plus a normal profit, and included, in addition, an amount sufficient to cover the processing tax. The result was that the taxpayer's apparent gross income for 1935 was enhanced by approximately $100,000. This unnatural increment to gross earnings was due entirely to invalid processing taxes. As of December 31, 1935, it was offset [fol. 73] by an accrued liability for processing taxes. However, on January 6, 1936, the Agricultural Adjustment Act was adjudicated unconstitutional and the taxpayer's processing tax liability was absolved. Thereupon, business necessity required that the taxpayer reimburse its vendees for taxes collected from them as a part of the sale price of flour if it could do so and not become liable for unjust enrichment taxes thereon. In 1936, 1937, and 1938, after the taxpayer had obtained a ruling on its unjust enrichment liability from the Treasury, it repaid to its vendees, $45,-

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[3] Section 43 of the Revenue Act of 1934, 48 Stat. 694, in part reads:

> "The deductions and credits provided for in this title shall be taken for the taxable year in which 'paid or accrued' or 'paid or incurred,' dependent upon the method of accounting upon the basis of which the net income is computed, unless in order to clearly reflect the income the deductions or credits should be taken as of a different period * * *"

865.90, in compromise of claims asserted by such vendees. Obviously, these payments had absolutely no relation to the cost of earning income in the years of payment. Equally apparent is the fact that they had direct relation to the taxpayer's 1935 gross income. They represented refunds to vendees of amounts paid to the taxpayer in 1935 as a part of the sale price of flour because of the processing tax. They, in fact, resulted in a reduction of taxpayer's gross income from 1935 sales. Only by relating them to the year 1935 can the income for that year be truly reflected. It seems to me that it was to relieve against just such a situation that Section 43 was enacted. The following from the opinion of the Eighth Circuit, in Helvering v. Cannon V. M. Co., 129 F. 2d 642, 646, is apposite:

"*Application.* In the months of May and June, 1935, this taxpayer collected the processing tax as a part of its sales prices. In its tax return for that year, the amount of such collections was included in its gross income and was entirely offset by a claimed tax deduction. The result was that the collections had no effect upon its net income. Three years later, the Commissioner redetermined the tax by disallowing the deduction. Since this disallowance left the gross income (which included the collections) undisturbed, the result would be that the net income would be increased by the amount of the collections. It was not until 1936 that the contingency (validity vel non of the A. A. Act) was resolved and the right of taxpayer to the accrued income from the collections was determined. Therefore, the disallowance by the Commissioner was a relation back to the tax year 1935 of an accrual which had become fixed in a later year. At the time of the redetermination, it was established that only a part of the [fol. 74] collections had remained the property of the taxpayer and a part of its income. All that taxpayer seeks is to have related back from 1937, the disbursements which reduced the collections in order that its net income for 1935 will be 'clearly' and truly stated. Both the deduction and the reimbursements relate to the same transactions in 1935. Clearly, to disallow the deduction and to refuse the decrease thereof by the reimbursements will distort the taxable income for that year. To permit the Commissioner to open up the item

of deduction only to the extent it serves his purposes and to deny the taxpayer the effect of the reimbursements affecting the same item resulting in its paying a higher tax than it justly owes is an injustice to the taxpayer."

With respect to the second issue determined by the Board, for like reasons it seems to me the item of $2,649.25 should be treated as income in 1935. I do not think the closing agreement precludes an examination of the factual situation upon which it was predicated.

One subsidiary question remains: Noncompliance by the taxpayer with Art. 43 (1), Tr. Reg. 86, promulgated under the Revenue Act of 1934. In the first place, there was no occasion for the taxpayer to claim in its subsequent returns the deductions which it had taken in its 1935 return. In the second place, the rulings of the Commissioner fairly indicate that it would have been futile for the taxpayer to have claimed the deductions in its subsequent returns as of the year 1935. Finally, the issue was not raised at the hearing before the Board and that precludes its consideration here.[4] The case does not fall within the exception recognized in Hormel v. Helvering, 312 U. S. 552, and Helvering v Richter, 312 U. S. 561.

For the reasons indicated I think the decision of the Board should be Affirmed.

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[4] New Amsterdam Cas. Co. v. Farmers Co-Op. Union, 8 Cir., 2 F. 2d 214, 218;

New York Life Ins. Co. v. Doerksen, 10 Cir., 75 F. 2d 96, 101;

American Home Fire Assur. Co. v. Hargrove, 10 Cir., 109 F. 2d 86, 87;

Liberty Petroleum Co. v. California Co., 10 Cir., 114 F. 2d 980, 981.

[fols. 75-83] IN UNITED STATES CIRCUIT COURT OF APPEALS

JUDGMENT, CASE NO. 2556—March 6, 1943

Seventeenth Day, January Term, Saturday, March 6th, A. D. 1943. Before Honorable Orie L. Phillips, Circuit Judge, and Honorable J. Foster Symes, District Judge.

This cause came on to be heard on the transcript of the record from the United States Board of Tax Appeals and was argued by counsel.

On consideration whereof, it is now here ordered and adjudged by this court that the decision of the said United States Board of Tax Appeals in this cause be and the same is hereby reversed; that this cause be and the same is hereby remanded to The Tax Court of the United States for further proceedings in accordance with the views expressed in the opinion of the court; and that Commissioner of Internal Revenue, petitioner, have and recover of and from The Security Flour Mills Company, respondent, his costs herein and have execution therefor.

IN UNITED STATES CIRCUIT COURT OF APPEALS

JUDGMENT, CASE NO. 2589—March 6, 1943

Seventeenth Day, January Term, Saturday, March 6th, A. D. 1943. Before Honorable Orie L. Phillips, Circuit Judge, and Honorable J. Foster Symes, District Judge.

This cause came on to be heard on the transcript of the record from the United States Board of Tax Appeals and was argued by counsel.

On consideration whereof, it is now here ordered and adjudged by this court that the decision of the said United States Board of Tax Appeals in this cause be and the same is hereby reversed; and that this cause be and the same is hereby remanded to The Tax Court of the United States for further proceedings in accordance with the views expressed in the opinion of the court.

Petition for rehearing, covering 7 pages, filed May 22, 1943, omitted from this print. It was denied, and nothing more by order of May 22, 1943.

[fol. 84] IN UNITED STATES CIRCUIT COURT OF APPEALS

ORDER DENYING PETITION FOR REHEARING—May 22, 1943

Thirty-first Day, March Term, Saturday, May 22nd, A. D. 1943. Before Honorable Orie L. Phillips, Honorable Sam G. Bratton and Honorable Walter A. Huxman, Circuit Judges.

The Security Flour Mills Company having heretofore filed a petition for rehearing in the above entitled causes and having been requested by the court to eliminate certain remarks in such petition for rehearing, and having presented a new petition for rehearing.

It is now here ordered by the court that said new petition for rehearing be and the same is hereby filed instanter, which is accordingly done. It is further ordered by the court that the petition for rehearing in these causes be and the same is hereby denied.

IN UNITED STATES CIRCUIT COURT OF APPEALS

ORDER RE ISSUANCE OF MANDATES

On June 2, 1943, the mandates of the United States Circuit Court of Appeals, in accordance with the opinion and judgments of said court, were issued to The Tax Court of the United States.

[fol. 85] Clerk's Certificate to foregoing transcript omitted in printing.

[fol. 86] UNITED STATES CIRCUIT COURT OF APPEALS, TENTH CIRCUIT

CLERK'S CERTIFICATE RE FILING OF PETITION FOR REHEARING

I, Robert B. Cartwright, Clerk of the United States Circuit Court of Appeals for the Tenth Circuit, do hereby certify that in case No. 2556, Commissioner of Internal Revenue vs. Security Flour Mills Company, a petition for rehearing was filed in this court on April 5, 1943, which was within the thirty days from March 6, 1943, the date of the judg-

ment of this court, for the filing of a petition for rehearing. A substituted petition for rehearing was filed May 22, 1943, by leave of court.

In testimony whereof, I hereunto subscribe my name and affix the seal of the United States Circuit Court of Appeals for the Tenth Circuit, at my office in Denver, Colorado, this 30th day of August, A. D. 1943.

Robert B. Cartwright, Clerk of the United States Circuit Court of Appeals, Tenth Circuit. (Seal.)

[fol. 87] SUPREME COURT OF THE UNITED STATES

ORDER ALLOWING CERTIORARI—Filed October 11, 1943

The petition herein for a writ of certiorari to the United States Circuit Court of Appeals for the Tenth Circuit is granted.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

Endorsed on cover: File No. 47,769. U. S. Circuit Court of Appeals, Tenth Circuit, Term No. 276. The Security Flour Mills Company, Petitioner, vs. Commissioner of Internal Revenue. Petition for a writ of certiorari and exhibit thereto. Filed August 21, 1943. Term No. 276, O. T., 1943.